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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1675

The North Carolina Utilities Commission, Southeastern Association of Regulatory Utility Commissioners,

*Petitioners,*

v.

The Federal Communications Commission and the United States of America, et al.,

*Respondents.*

## PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, The North Carolina Utilities Commission ("NCUC") and the Southeastern Association of Regulatory Utility Commissioners ("SEARUC"), request this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

### Opinions Below

The decision of the Court of Appeals is reported at ——F.2d——, and appears at Appendix A of the

companion volume of appendices.[1] The decision affirmed the following orders and opinions of the Federal Communications Commission ("FCC"): The FCC's First Report and Order, 56 F.C.C.2d 593 (1975), appearing at Appendix B; the FCC's Second Report and Order, 58 F.C.C.2d 736 (1976), appearing at Appendix C; the FCC's Memorandum Opinion and Order released February 13, 1976, 57 F.C.C.2d 1216, appearing at Appendix D; the FCC's Memorandum Opinion and Order released March 15, 1976, 58 F.C.C.2d 716, appearing at Appendix E; and the FCC's Memorandum Opinion and Order released April 28, 1976, 59 F.C.C.2d 83, appearing at Appendix F.

## Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit, appearing at Appendix G, was entered on March 27, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## Questions Presented

(1) Did the FCC exceed its authority under Sections 2(b) and 221(b) of the Communications Act of 1934, by establishing a massive new federal registration program for terminal equipment, thereby preempting the jurisdiction of State regulatory commissions over such terminal equipment which is used predominantly for, or in connection with, local and intra-

1. Citations herein to the appendices are to pages of a separately bound companion volume to the Petition for Writ of Certiorari filed by the American Telephone and Telegraph Company, No. ____, and cited as "Pet. App."



state communication service, and which has been regulated by State regulatory commissions for over four decades?

(2) Does the FCC's registration program amount to an illegal nullification of State regulatory commissions' ratemaking powers with respect to facilities used for, or in connection with, local and intrastate communication services?

## Statutes Involved

Sections 2(b)(1) and 221(b) of the Communications Act of 1934 provide as follows:

Section 2, 47 U.S.C. § 152, provides:

* * * *

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, . . . .

Section 221, 47 U.S.C. § 221, provides in part:

* * * *

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connec-

> tion with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local government authority.

Other pertinent provisions of that Act are set forth in Appendix H.

## Statement of the Case

The North Carolina Utilities Commission ("NCUC") is a commission created by the State of North Carolina and charged by North Carolina law with the responsibility, *inter alia*, to assure the establishment and maintenance of telephone communications service within that State and to regulate the companies providing such service as common carrier public utilities. N.C. Gen. Stats., Ch. 62, §§ 3(23)(a) (6), 30, 32 (1965). The Southeastern Association of Regulatory Utility Commissioners ("SEARUC") is an organization consisting of the regulatory commissioners of the States of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. These regulatory commissions are charged by the laws of their respective States with responsibilities similar to those of NCUC.

Although there are differences among the various States in the method of regulation, the goal in every instance is to assure the availability of high quality telephone service at just and reasonable rates to as many citizens of the State as possible. To meet this goal, the States represented herein have delegated to



their commissions the authority to regulate both the price at which telecommunications service and equipment may be offered within the State, and the terms and conditions under which such service and equipment can be offered. State commissions, such as those represented here, have actively exercised this jurisdiction since long prior to the enactment of the Communications Act of 1934. The effectiveness of State regulation in this predominantly local and intrastate telecommunications service has resulted in a nationwide telephone communications system of unsurpassed excellence and efficiency.

The issues presented by this massive new federal registration program are neither abstract nor hypothetical — they strike at the very heart of State regulatory jurisdiction as it has existed in the area of telecommunications for over forty years. The registration orders usurp the express authority of the State commissions over "facilities" used in local and intrastate services, which authority is expressly reserved by the Communications Act of 1934. Moreover, the registration program would oust the State commissions of their jurisdiction to establish and implement policies governing the rates and charges for terminal equipment. With their ratemaking policies so impaired, the ability of State commissions to meet their statutory obligations to the citizens they serve is severely jeopardized.

Thus, the interest of the State commissions in this case is to vindicate, preserve, and protect the concept of State regulation of terminal equipment — a concept that has served this nation for over forty years, and

under which this country has developed the finest telecommunications system in the world.

A. *The Nature of the Telephone Service and Facilities at Issue.*

Telephone service in this country typically begins with a piece of "terminal equipment," provided to the subscriber by the local telephone company, and consisting ordinarily of the standard telephone handset used by virtually all residential subscribers. This terminal equipment is connected to a pair of wires (a "subscriber loop") that leads to a central office where the local telephone company maintains its switching apparatus. No matter what the ultimate destination of a subscriber's call, his messages originate in the same terminal equipment and travel over the same wires to this central switching office. From this central switching office, calls are switched either within the local exchange or to other exchanges which may be within or outside the State.

Thus, all calls over the switched telephone network make use of common terminal equipment, common lines to a central switching office, and common switching apparatus in that office. Of all calls currently transmitted over those common facilities, about 97% are local exchange or intrastate, and only about 3% are interstate long-distance. *In Re Telerent Leasing Corp.*, 45 F.C.C.2d 204, 211 (1974), *aff'd sub nom. North Carolina Utilities Comm'n. v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, ____U.S.____, 50 L.Ed.2d 631 (1976).[2]

2. These relative percentages have remained constant throughout the history of telephone service in this country. At the time the Communications Act was enacted in 1934, it was estimated that 97½% or 98% of all telephone calls were local exchange or intrastate calls. 78 Cong. Rec. 10316 (1934).



In addition to the standard telephone handset, more sophisticated and specialized terminal equipment is available to a subscriber. This equipment includes private branch exchange switchboards (PBX's) for use in larger business communications systems, automatic answering and recording machines and devices for the transmission of computerized data through the telephone network. Historically, this equipment was offered by the regulated telephone companies at additional charges. More recently, however, unregulated manufacturers have entered the terminal equipment field and offered to sell or lease their equipment to subscribers for direct connection to the switched telephone network, when such connection has been permitted by tariffs filed with State regulatory commissions.

B. *The History of State Regulation of Local and Intrastate Charges, Classifications, Practices, Services and Facilities.*

From the beginning of the telecommunications industry in this country, State commissions have regulated the charges, classifications, practices, services and facilities used "for or in connection with" local and intrastate communication service, including the terms and conditions upon which a subscriber could substitute his own equipment or attach additional devices to the terminal equipment provided by the telephone company. And from its inception, this State regulation has been premised upon the concept that regulation, rather than unrestricted competition, best serves the public interest. After the expiration of the

initial telephone patents, and prior to any regulation by the States, anyone could set up a telephone exchange and offer telephone service. The result in many towns was two or three competing telephone exchange systems, requiring subscribers to install and pay for two or more telephones side-by-side in order to be able to reach every other subscriber. Such duplicative facilities required far more investment than was necessary to create an efficient telephone network.[3]

Without regulation, the early telephone companies were also free to serve whatever locations they chose, and thus they frequently elected to serve only the most profitable segments of the geographical markets in which their lines were located. Those segments consisted of areas whose residents could afford to pay high rates for telephone service and areas that were the least costly to serve, such as the more densely populated central business districts. This pattern of unregulated competition placed outlying and rural

3. The Supreme Court of Pennsylvania accurately described the deleterious effects of this early competition in the telecommunications industry in *Perry County Telephone & Telegraph Co. v. Public Serv. Comm'n.*, 108 A. 659, 661 (Pa. 1919):

> [D]uplication of facilities merely results in the placing of an additional burden upon the public by forcing patrons to maintain two systems where one would serve the purpose as effectively and at less cost . . . . The duplication of telephone systems in a given locality without connection between their lines requires subscribers to install both systems and pay for double service to reach subscribers on but one of the two systems; or, as frequently happens, subscribers maintain both systems when they can reach other users with equal facility on either system.



areas at a critical disadvantage in receiving telephone service.

The answer of the State legislatures to these problems was to substitute regulation for competition as the means of promoting the public's interest in widely available telecommunications service at reasonable prices.[4] Typically, State regulation was, and continues to be, premised on the principle that a telephone company is a common carrier public utility, and as such it is required to serve all segments of the public and to do so on fair and non-discriminatory terms. The State commissions were given power fully to regulate the price of telephone service to different groups of subscribers and to require that such service be made available to all without regard to costs of such service for particular groups of subscribers. So long as a fair overall return can be earned, it is the ultimate responsibility of the State commissions, not the telephone companies, to determine the amounts different classes of telephone users should contribute to meet the companies' overall revenue requirements.

As a corollary to regulation in the public interest, State commissions were also given the power to limit entry into the telecommunications industry. Since public interest frequently required the maintenance of rates unrelated to costs, this control over entry was absolutely critical to the regulatory scheme. Otherwise, unregulated competitors could enter those portions of

4. State regulation of telecommunications became widespread beginning in the late 1890's, and by 1910 only a few States had not enacted regulatory statutes. Today every State has an agency charged with the responsibility of regulating telecommunications within its borders.

the market in which the rates were relatively high compared to the costs and "skim the cream" of the business — a practice that would be plainly detrimental not only to the regulated telephone company, but also ultimately to the ordinary residential user for whose benefit these relatively higher rates were prescribed in order to make basic telephone service available at just and reasonable rates.

The jurisdiction thus exercised by State commissions became a powerful tool for the development and implementation of public policy. Most State commissioners recognized at an early date that business subscribers receive more value than residential subscribers from telephone service. On the basis of this value-of-service principle, business subscribers have generally been required to pay higher rates than residential customers. This permits the regulatory agencies to keep residential rates relatively lower, thereby promoting the general availability of service. *See, e.g., Re Pacific Telephone & Telegraph Co.*, 1919D P.U.R. 345, 370-71 (Ore. P.S.C. 1919).

A similar policy objective has been pursued by virtually all of the State commissions insofar as rural subscribers are concerned. Although it has been recognized that rural and lightly populated areas are much more costly to serve, regulatory agencies have required state-wide uniformity of rates for important aspects of telephone service, thus causing many urban subscribers to pay rates in excess of the costs of their service in order that rural subscribers can obtain service at rates they can afford. *See, e.g., Re Pacific Telephone & Telegraph Co.*, 1922C P.U.R. 248, 272 (Ore. P.S.C. 1922); *Re Mountain States Telephone & Telegraph Co.*, 1918F P.U.R. 415, 674 (Colo. P.S.C. 1918).



Yet another frequently used ratemaking practice has been that of requiring relatively high charges for certain terminal equipment in order to hold down other rates and charges. Thus, extension telephones have generally been priced at levels well above their costs on the theory that those using such telephones (presumably wealthier subscribers) should make a relatively larger contribution than subscribers using only main station service. *See, e.g., Morris v. New Jersey Bell Telephone Co.*, 6 P.U.R. (n.s.) 258 (N.J. P.U.C. 1934); *Re General Telephone Co. of California*, 80 P.U.R.3d 2, 74-76 (Cal. P.U.C. 1969); *Re Chesapeake & Potomac Telephone Co.*, 56 P.U.R.3d 91, 115 (Md. P.S.C. 1964) (same principle applied to decorator telephones designed to complement the decor of the rooms in which they are placed). Furthermore, many States have recognized the greater value to business of sophisticated terminal equipment such as private branch exchanges (PBX's) and key telephone systems, by establishing rates for such equipment substantially in excess of their costs, thereby lessening the burden upon basic residential subscribers. *See, e.g., General Services Administration v. New York Telephone Co.*, 63 P.U.R.3d 451, 462-63 (N.Y. P.S.C. 1965); *Public Service Comm'n. v. Mountain States Telephone & Telegraph Co.*, 1927B P.U.R. 193 (Mont. P.S.C. 1926).

The overriding State interest in all these ratemaking practices is the promotion of universal telephone service. Having struggled through a period of competition in the telecommunications industry that sharply restricted both the availability and the usefulness of telecommunications services, the State commissions developed ratemaking policies designed to make certain

that regulation would cure the basic defects that plagued the early days of the industry. This principle has been articulated by numerous State agencies. In *Re Pacific Telephone & Telegraph Co.*, 1919D P.U.R. 345 (Ore. P.S.C. 1919), for example, the Oregon Public Service Commissioner held:

> Residence service costs more for investment and but little less for operation than business, yet the rates must be much lower or service will not be taken. It is the extensive use of telephones in residence service that makes their use valuable to business .... [R]esidence service is commonly conducted at a loss made up in the charges for business use .... Any attempt to make rates proportionate to cost would result in residence charges so high that few householders would use the telephone at all ....

*Id.* at 370-71. *See also Southern Bell Telephone & Telegraph Co.*, 1929E P.U.R. 392, 396 (La. P.S.C. 1929); *Board of Trade v. Mountain Home Telephone Co.*, 1916C P.U.R. 688, 700 (N.Y. P.S.C. 1916); *Empire Telephone Co.*, 1915B P.U.R. 561, 564 (Ill. P.U.C. 1915).

Not all State commissions followed identical policies in structuring rate schedules. Complete uniformity in regulation among the States does not now exist, nor has it ever existed. At least one State regulatory agency has determined, for example, that the public interest within its State is best served by a limited amount of competition in providing telephone terminal equipment and has liberalized the conditions upon which



certain customer-provided terminal equipment can be connected directly to the network.[5] But this policy was necessarily based upon that State commission's assessment of the particular conditions existing in that State. Quite obviously, the need for a relatively greater contribution from business, urban and special equipment users to support reasonable residential rates for basic service will vary from State to State, depending upon the level of personal income throughout the State, the nature and extent of business activity, the pattern of population dispersion and numerous other factors.

It remains true that in most, if not all the States, reliance upon ratemaking powers and methodology is necessary to promote the broad availability of telecommunications services to the widest possible range of users, so as to override particular cost considerations that exist in various areas of the State and among various classes of users. Hence, most States, including all the States represented here, still require the maintenance of non-cost-related rate structures in order to hold down the price of basic residential service and thereby to bring such service within the economic reach of a maximum number of households, *See, e.g., Re Southwestern Bell Telephone Co.*, 95 P.U.R. (n.s.) 1, 9 (Ark. P.S.C. 1952); *Re Mutual Telephone Co.*, 76 P.U.R. (n.s.) 389, 402-03 (Hawaii P.U.C. 1948); *Re Southern Bell Telephone & Telegraph Co.*, 18 P.U.R.3d 113, 124 (Ky. P.S.C. 1957).

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5. *See Investigation . . . into the Promulgation of a General Order Providing for . . . the Interconnection of a Customer-Opinion and Order*, Case No. 9625, California P.U.C. (April 22, 1975).

C. *Recent Intrusion into State Regulation by the FCC.*

Prior to its recent *Telerent* order,[6] the Federal Communications Commission had never sought to oust the State commissions from their traditional jurisdiction over terminal equipment and related ratemaking policies, or from entry into the intrastate communications market. Historically, the only instances where the FCC exerted jurisdiction over terminal equipment involved highly specialized equipment *not* used in connection with switched telephone exchange service defined by the Communications Act of 1934.[7]

Where the FCC has in the past exercised its jurisdiction over interstate aspects of the switched telephone network, it has been careful not to infringe upon State regulation. In each case in which the FCC has considered the legality of tariff provisions governing interconnection, it has ruled only on the legality of interconnect conditions that were part of the *interstate* tariffs of telephone companies. *See, e.g., Use of Recording Devices*, 11 F.C.C. 1033 (1947); *Jordaphone Corp. v. American Telephone & Telegraph Co.*, 18 F.C.C. 644 (1954); *Hush-A-Phone Corp. v. American Telephone & Telegraph Co.*, 22 F.C.C. 112 (1957); *Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C.2d 571 (1968).

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6. *In Re Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n. v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, ____U.S.____, 50 L.Ed.2d 631 (1976).

7. *See American Telephone & Telegraph Co.-TWX*, 38 F.C.C. 1127 (1965); *Department of Defense (DOD) v. General Telephone Co.*, 38 F.C.C.2d 803 (Rev. Bd. 1972), *aff'd*, 41 F.C.C.2d 1047 (1973), *aff'd per curiam, St. Joseph Telephone & Telegraph Co. v. FCC*, 505 F.2d 476 (D.C. Cir. 1974); *General Telephone Co.*, 13 F.C.C.2d 448 (1968), *pet'n. for reconsid. denied*, 14 F.C.C.2d 695 (1968).



Notwithstanding the limited scope of these prior FCC cases, it is upon these decisions that the FCC relies in upholding the registration orders that are the subject of this petition.

*Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C. 2d 571 (1968), was a complaint case against American Telephone & Telegraph Company ("AT&T") brought by the inventor of the Carterfone, a device for linking telephone subscribers and two-way radio operators. It was initiated by a complaint filed in federal district court in Texas, the only State which at the time had no regulatory commission, and was thereafter referred to the FCC. The case was not a rulemaking proceeding and did not purport to bind anyone not a party to it. It involved only the long-distance, interstate tariffs of AT&T filed with the FCC — not the local or intrastate tariffs of any of the AT&T system operating companies or the tariffs of any independent telephone company. No State or State commission was a party to the proceeding, nor did any have reason to intervene. No question of substituting customer-provided terminal equipment or equipment offered by a local telephone company was raised.[8] The decision in *Carter-*

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8. Indeed, in *Carterfone* the FCC itself rejected the very position asserted by FCC counsel in the court below. There, General Telephone Co. "contended that the Commission 'has opened the door to customer ownership of telephone handsets.'" The Commission flatly rejected this contention on the basis that, "The facts of this case did not involve the furnishing of purely telephone system equipment telephone-to-telephone on the message toll telephone system." 14 F.C.C.2d at 572.

Three months later, the FCC again rejected the same contention, noting that *Carterfone* did *not* hold that a customer

*fone* did not purport to restrict State commissions, nor to affect the States or their ratemaking policies in any way. Thus, no question of interfering with State juris-

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may substitute his own equipment for that furnished by the telephone company:

> We were concerned in [*Carterfone*] with the lawfulness of tariff provisions that prohibit a customer from making harmless interconnection of his terminals or systems with the message toll telephone system of the telephone companies. As we have heretofore stated, *this telephone system includes the telephone instrument* which performs the network control signalling functions for message toll telephone service. We were therefore concerned with what could be connected or attached to this telephone system. *Our decision in Carterfone does not hold that a customer may substitute his own equipment or facilities* (whether it be *telephone instruments*, loops, poles, or central office equipment) *for that furnished by the telephone company in providing message toll telephone service* as that service is defined in the tariff. Our decision dealt with interconnections and not replacements of any part of the telephone system. We emphasized this in our decision where we stated that "our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operation or the telephone system's utility to others." 13 F.C.C.2d at page 424. In denying petitions for reconsideration we again made this clear by stating that "General has contended that the Commission has opened the door to customer ownership of telephone handsets. The facts of this case did not involve the furnishing of purely telephone system equipment telephone-to-telephone on the *message toll telephone system*." 14 F.C.C.2d 571 at page 572.

*AT&T*, 15 F.C.C.2d 605, 609-10 (1968) (emphasis supplied).



diction over local and intrastate service or rate policies was present.[9]

When *Carterfone* was decided by the FCC in 1968, the State commissions thus had every reason to assume that their jurisdictions were not threatened, since the decision involved only interstate rates and tariffs. The FCC itself made this assumption; for, at virtually the same time it was deciding *Carterfone*, it also ruled in another proceeding that the FCC could not regulate the telephone handset or other terminal equipment "merely because of the circumstance that every telephone can be connected with a toll line for interstate calls." *General Telephone Co.*, 14 F.C.C.2d 695 (1968). According to the Commission in that proceeding:

> When the Communications Act was enacted in 1934, Congress was concerned that the telephone might be considered an instrumentality of interstate communication merely because of the circumstance that every telephone can be connected with a toll line for interstate calls. Since the interstate calls of the independent telephone companies were such a small part of their business as to be merely incidental, *Congress agreed with the* [United States Independent Telephone Association]

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9. *Hush-A-Phone Corp. v. American Telephone & Telegraph Co.*, 22 F.C.C. 112 (1957), was likewise a complaint case against AT&T and also involved only an AT&T interstate tariff filed with the FCC. Again, no local operating companies were involved, and no States or State commissions were parties. The hush-a-phone was an attachment for a telephone intended to insure privacy. No question of substituting customer-provided terminal equipment was presented.

> *position that "the tail should not wag the dog"; that their telephone facilities should remain under State regulation*, primarily because they were essentially local but also to avoid an unnecessary burden to the Commission and the small independent companies . . . .

*General Telephone Co.*, 14 F.C.C.2d at 696 (emphasis supplied).[10]

Thus, the decision in *Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C.2d 571 (1968), for from being the watershed opinion it is hailed to be by the FCC, in fact extended only to interstate services and tariffs. It had no impact whatsoever on the ability of the State commissions to maintain their own rate policies regarding facilities used "for or in connection with intrastate exchange service . . . ." Communications Act of 1934, § 2(b) (1) (47 U.S.C. § 152).

After the *Carterfone* decision, telephone companies in interstate communications filed with the FCC amended tariffs changing restrictions on the connec-

10. The FCC Chairman reaffirmed this position in 1973 in a letter to the Chairman of a Senate Subcommittee:

> We . . . lack primary juisdiction over telephone sets which are a primary part of the facilities used in providing exchange telephone service. As you know, the Communications Act specifically excludes the Federal Communications Commission from any authority with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate and exchange telephone services of any telephone company; such local service matters are subject to the regulatory authority of State commissions in the various states.

119 Cong. Rec. S17297 (daily ed. Sept. 22, 1973).



tion of customer-provided terminal equipment to provide that interconnection would henceforth be permitted subject to two requirements designed to safeguard the telephone network: (1) that any network-controlled signalling unit must be furnished, installed and maintained by the telephone company; and (2) that no subscriber could connect terminal equipment directly to the telephone network without the use of a protective interface device supplied by the telephone company. The telephone companies filed similar revised tariffs with the regulatory commissions of the States in which the companies provided intrastate and local exchange service.

Noting an increasing use of customer-provided terminal equipment following the *Carterfone* decision, the North Carolina Utilities Commission instituted an investigation into the effects of interconnection on several broad areas of public interest, including the quality, pricing, and availability of telephone service in North Carolina.[11] Following the submission of studies and data relating to the issues, the North Carolina Utilities Commission issued an order on June 29, 1973, which gave notice of a proposed rule under which no telephone company doing business in North Carolina would be permitted to provide service over its communications system "except through station apparatus and equipment installed, owned, and serviced by the telephone company and for which the telephone company takes complete responsibility to its custom-

11. *In Re Investigation of Interconnection of Subscriber-Provided Equipment with the Telephone Network of Telephone Companies Under the Jurisdiction of the North Carolina Utilities Commission*, Docket No. P-100, Sub. 31.

er." North Carolina Order, June 29, 1973 (Rule 9-5).

On August 8, 1973, following the North Carolina Utilities Commission's announcement of its proposed rule, Telerent Leasing Corporation, an unregulated equipment manufacturer, along with a manufacturer's trade association and other equipment suppliers, filed a petition with the FCC for an order and declaratory ruling. This petition requested that the FCC rule that its regulation of interstate interconnection had preempted State regulation of interconnection with the local exchange and intrastate telephone systems. This declaratory relief was granted by the Commission on January 31, 1974 (released February 5, 1974). *In Re Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974) (hereinafter "*Telerent*"). In *Telerent* the FCC declard that its regulation of the technical standards for interconnecting terminal equipment used for interstate communications had preempted the States' long-held authority to control the interconnection of customer-provided terminal equipment in intrastate and local exchange telephone systems. 45 F.C.C.2d at 204.

The Court of Appeals for the Fourth Circuit affirmed the FCC's preemption order by a two-to-one vote. *North Carolina Utilities Comm'n. v. FCC*, 537 F.2d 787 (1976), *cert. denied*, ___U.S.___, 50 L.Ed.2d 631 (1976) (hereinafter "*North Carolina I*"). The majority opinion adopted a construction of Section 2(b) of the Communications Act of 1934 which would fragment jurisdiction over "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service". The court construed Section 2(b) of the Act as authorizing the FCC to regulate "facilities" used in local and intrastate service, but not the "charges" or rates ap-



plicable to such service. The majority held that the FCC had jurisdiction over interstate facilities — including the power "to determine what terminal equipment can safely and advantageously be interconnected with the interstate communications network and how this shall be done." *North Carolina I*, *supra*, 537 F.2d at 793. Since the same facilities were used for both interstate and intrastate calls (through only approximately 3% were used for interstate calls), the court reasoned that the federal and state regulatory rules for these same facilities might conflict. Thus, it held that under Section 2(b) of the Act, the federal rule — that of the FCC — preempted the rules of the States.

The court in *North Carolina I* also held, however, that under Section 2(b) of the Act the States could continue to regulate local and intrastate telephone rates. *North Carolina I*, *supra*, 537 F.2d at 793. It based this analysis upon the legislative history of Section 2(b), which shows that in 1934 the States' concern about the possible expansion of power on the part of the new FCC "focus[ed] upon the desire of state authorities to regulate local telephone rates and charges." *Id.* The majority reasoned that paramount federal jurisdiction over facilities would not interfere with State jurisdiction over rates since "ratemaking typifies those activities of the telephone industry which lend themselves to practical separation of the local from the interstate . . . ." *Id.* Accordingly, the majority found that extending FCC jurisdiction to local "facilities" would not result in encroachment upon State jurisdiction over "charges" or rulemaking powers. On this basis, it noted that its decision was consistent with the legislative history of the Communications Act of 1934 which showed plainly that the States were intended to have exclusive

jurisdiction over local telephone rates and charges including the rates and charges for terminal equipment.

D. *The Registration Orders and the Decision of the Court Below.*

This Court declined to review the FCC's decision in *Telerent*, which was affirmed by the United States Court of Appeals for the Fourth Circuit in *North Carolina I* ___U.S.___, 50 L.Ed.2d 631 (1976). The FCC in *Telerent* granted declaratory relief preempting the jurisdiction of NCUC because whatever regulations the FCC might ultimately adopt with respect to terminal equipment might be inconsistent with the exercise by NCUC of its jurisdiction. By contrast the FCC has now exercised its asserted jurisdiction by promulgating a series of orders which established a massive new federal regulatory program permitting direct interconnection of customer-provided terminal equipment to the local telephone company exchange facilities.

(1) *The FCC's Registration Orders.*

On November 7, 1975, the FCC released its first report and order in Docket No. 19528, which provided for registration of all types of terminal equipment, with the exception of certain specific categories such as PBX's, key telephone systems and main station telephones. 56 F.C.C.2d 626 (1975) (Pet. App. 1b). Shortly thereafter, even these three categories of equipment were made subject to the registration program by the issuance of the FCC's second report and order. 58 F.C.C.2d 736 (1976) (Pet. App. 1c).

Under the registration program promulgated by



the FCC, any piece of customer-provided terminal equipment meeting certain technical requirements and "registered" with the FCC may be directly connected to the local telephone company exchange facilities without the use of a protective interface device or of a network control signalling unit furnished and maintained by the telephone company. (Pet. App. 12b). All current tariffs inconsistent with these registration orders, including tariffs on file with the State commissions covering local or intrastate service, were invalidated:

> Except as herein provided, carriers may not require the use of such connecting arrangements or other interface devices or arrangements for FCC registered equipment or protective circuitry, and *may not impose other tariff conditions contrary to the Carterfone policy* without prior approval of the Commission.

56 F.C.C.2d at 599 (emphasis supplied).

The FCC, under the registration orders, would exercise no regulatory jurisdiction over the price to be paid by the subscriber for this terminal equipment. However, by invalidating tariff conditions contrary to the *Carterfone* policy, the registration orders would deprive the States of the power to compel compliance with their own ratemaking policies. In this respect, the registration orders inject an entirely new dimension into the controversy between the FCC and the State regulatory commissions over the interconnection of facilities. *North Carolina I* involved the validity of an FCC declaratory ruling by which the FCC sought to bar a State rulemaking proceeding. By contrast, in promulgating its registration orders the FCC has

moved far beyond an abstract declaration of jurisdiction. These orders promulgate a sweeping federal regulatory program that dictates the terms and conditions upon which customer and carrier supplied equipment may be connected to the telephone network. The registration orders now assert the FCC's power not only to preempt State jurisdiction over the technical standards for interconnection of facilities to the nationwide telephone network, but also to effectively nullify the States' ratemaking powers with respect to the use of those facilities.

In spite of the obvious impact on State ratemaking policies, the FCC declined to consider the economic impact of increased interconnection prior to its adoption of the registration program. (Pet. App 14b). The State commissions, however, whose constituents stand to lose the most from any adverse economic impact on State ratemaking policies, have continued to be concerned with the economic consequences. One of the primary purposes of the North Carolina Utilities Commission proceeding (which resulted in the FCC's *Telerent* order) was "to investigate the economic and service impact that interconnection is or will have in North Carolina and what change, if any, should be made in the method of providing telephone service and establishing telephone rates." North Carolina Order of Investigation, dated February 2, 1973, at page 12. A study conducted by the National Association of Regulatory Utility Commissioners ("NARUC") concluded that wide-spread connection of customer-provided terminal equipment could result in increased telephone rates for local residential and other users of approximately $360-740 million annually by 1980,



and approximately $1 billion by 1984. *NARUC Report after Investigation*, May, 1974.

The FCC's own inquiry into the economic impact of interconnection has been limited, and after the fact. After its decision in *Telerent*, the FCC established Docket No. 20003, as a separate inquiry into the economic impact, *inter alia*, of interconnection. However, the FCC decided to implement its massive registration program before it concluded the proceeding that was to gauge the expected economic impact of that program.[12] Moreover, Docket No. 20003 was designed to consider *federal* ratemaking policies. It does not even purport to deal with the destructive impact of interconnection on *State* ratemaking policies, which is the abiding concern of the State commissions herein.

(2) *The Decision of the Court of Appeals*

The registration orders were affirmed by the Court of Appeals for the Fourth Circuit on March 22, 1977, in an opinion issued over a vigorous dissent. (Pet. App. 1a). Prior to reviewing the registration orders, the Court of Appeals stayed the implementation of the registration program, recognizing that "the cost of changing the rating structure is irretrievable and must be paid by the subscribers." (Pet. App. 1j). Subsequent to its decision, the court stayed issuance of its mandate pending petitions for certiorari. (Pet. App. 13j).

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12. After this case had been briefed and argued in the court below, the FCC issued a first report (with no order) in Docket No. 20003. Although the court below was apprised of this first report, the majority specifically declined to rely on it in its opinion. (See Pet. App. 10a).

In affirming the registration orders, the majority held that the FCC has jurisdiction over facilities used predominately in local or intrastate service, despite Sections 2(b)(1) and 221(b) of the Communications Act of 1934. The majority so ruled even though State ratemaking policies would be nullified by the FCC's registration orders and even though ratemaking jurisdiction was expressly preserved for the State commissions under the holding in *North Carolina I*.

For these and other defects, the decision of the Court of Appeals should be reviewed by this Court.

## Reasons for Granting the Writ of Certiorari

### I.

### The Court Below Erred in Holding that Section 2(b) of the Communications Act of 1934 Does Not Protect the Jurisdiction of the State Commissions Over Facilities Used for Local and Intrastate Communications Service.

In Section 2(a) of the Communications Act of 1934, Congress authorized the FCC to regulate "interstate and foreign communication." 47 U.S.C. § 152(a). This grant of jurisdiction is qualified, however, by a reservation of jurisdiction to the States, which is found in Section 2(b) of the Act, providing that the FCC may not use its jurisdiction over interstate communications to intrude upon the States' jurisdiction over intrastate communications, charges, services or facilities:

> Subject to the provisions of Section 301 of this Title [dealing with radio frequencies and not applicable to this case], nothing in the chapter shall be construed to apply or to give the Commission



> jurisdiction with respect to (1) charges, classifications, practices, services, *facilities*, or regulations *for or in connection with intrastate communication service* by wire or radio of any carrier, . . . .

47 U.S.C. § 152(b) (empasis supplied).

In Section 221(b) of the Act, Congress also expressly reserved to the States the right to regulate "telephone exchange service," even though communication within a telephone exchange area may be across State lines:

> Subject to the provisions of section 301 of this title, *nothing* in this chapter *shall be construed to apply, or to give the Commission jurisdiction, with respect* to charges, classifications, practices, services, *facilities*, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State Commission or by local governmental authority.

47 U.S.C. § 221(b) (emphasis supplied).

The jurisdictional dispute between the FCC and the State commissions presented in this case arises out of the fact that the same local facilities — including the basic telephone handset — are used both for local and intrastate service and for interstate service. The majority opinion held that the FCC can regulate such local telephone facilities. (Pet. App. 16a). However, Section 2(b)(1) of the Act reserves to the States jurisdiction over "facilities" if they are used "for or in connection with intrastate communications service."

Since terminal equipment is so used (indeed, 97% of its use is local or intrastate), it is covered by the express reservation of jurisdiction in Section 2(b)(1).

There is nothing new about the question of who should be authorized to regulate the telephone handset and other terminal equipment. In 1934, just as today, the same local telephone exchanges and switching facilities, the same telephone handsets, and the same local loops connecting the telephones to the central exchanges, were all (or virtually all) used both for local or intrastate calls and for interstate calls. The question thus arose: Which level of government, the federal government or the States, should provide the regulatory rule that would govern these instruments of both local and interstate communication service. Congress knew that at that time approximately 98% of all calls were local or intrastate calls, and only approximately 2% were interstate. 78 Cong. Rec. 10316 (1934). Thus, it decided that "the tail should not wag the dog," and that State commissions should continue to regulate intrastate facilities, services and rates. To accomplish this purpose, the express provision of Section 2(b) regarding facilities was enacted.[13]

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13. Section 221(b) deals with the situation where a local telephone exchange overlaps State boundary lines and includes two or more States. The section provides that even in this situation — where what is essentially a local call happens also to be an interstate call — "nothing in this chapter shall be construed . . . to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations . . . *in any case where such matters are subject to regulation by a State Commission or by local governmental authority*" (emphasis supplied). The majority below attached a great deal of significance to the fact that this latter italicized



In this respect, nothing has changed since 1934. Local exchanges and intrastate telephone messages still amount to approximately 97% of total messages. And Congress has not repealed Section 2(b) or amended Section 2(b) by omitting the word "facilities."

It is no historical accident that the Communications Act of 1934 contains such explicit reservation of State jurisdiction. The legislative history of the Act conclusively shows that it would never have been passed if Section 2(b) and Section 221(b) had not been added to the Act for the express purpose of preserving the jurisdiction of the State commissions over local telephone charges, services, and facilities. As shown above *(supra*, p. 7 *et seq.)*, the States historically regulated local and intrastate service, the conditions of such service, the charges and rate structures applicable to such service and the right to enter into the market for such service. In 1934 the State commissions feared that a newly-created FCC, with juris-

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languages does not appear in Section 2(b)(1). The majority contends that the absence of this language is a reproach to the State commissions' construction of Section 2(b)(1). (Pet. App. 15a). In fact, Section 221(b) supports State jurisdiction. Under Section 221(b), State regulation explicitly takes precedence over FCC regulation where a local exchange overlaps State boundaries. This only emphasizes the fact that the FCC has no jurisdiction at all over local exchanges or facilities where local exchanges do not overlap State boundaries.

It would have made no sense whatever for Congress expressly to provide that State jurisdiction takes precedence over FCC jurisdiction as to certain interstate calls (where exchanges overlap State boundaries), but leave it to the FCC's discretion to supersede State jurisdiction over exchanges (and facilities with those exchanges) where the exchanges do not overlap State boundaries.

diction over interstate communications, might use its jurisdiction to preempt State regulation over local and intrastate communications service — the same way the Interstate Commerce Commission used its powers to preempt State regulation of intrastate rail transportation. *Houston East & West Texas Ry. v. United States*, 234 U.S. 342 (1914) (the *Shreveport Rate Case*). In the *Shreveport Rate Case*, the Court upheld the ICC's jurisdiction under the Interstate Commerce Act to preempt State jurisdiction over intrastate railroad rates, which rates were found to discriminate against interstate commerce. In other cases, the ICC has assumed jurisdiction over intrastate transportation facilities. *E.g.*, *Railroad Comm'n. of Ohio v. Hocking Valley Ry.*, 12 I.C.C. 398, 404 (1907); *Train Service on Northern Pacific*, 112 I.C.C. 191, 195 (1926).

Accordingly, because of the possibility that the FCC might attempt to expand its jurisdiction to include local and intrastate charges, services and facilities (as the ICC had done), representatives of the States strenuously opposed the original version of the bill as introduced in both the House and Senate. *Hearings on S. 6 Before the Senate Committee on Interstate Commerce*, 71st Cong., 1st Sess., 2167-68 (1930). Because of this opposition, the bill was amended by the addition of Section 2(b), which provided that nothing in the Act was to be construed to give the FCC jurisdiction over local and intrastate "charges, classifications, practices, services, facilities, or regulations," with the addition of Section 2(b), the State commissions changed their position and supported the bill.[14]

14. John Benton, general solicitor of the National Association of Railroad and Utilities Commissioners, testified in favor of the amended bill as follows:



> *Nobody suggests that the Federal Government ought to attempt to displace the State regulatory agencies in the regulation of intrastate telephone business*, yet there is danger that State regulation will be seriously hampered and broken down if care be not taken in the framing of any law providing for an active Federal commission, exercising jurisdiction in the communications field.
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> • • •
>
> It is common knowledge that under the Interstate Commerce Act the power of the Interstate Commerce Commission has been so extended that State regulation of intrastate railroad rates has become little more than nominal.
>
> • • •
>
> Unless the Congress wishes to bring control of *local telephone business, which is now subject to State regulation* under the domination of the new commission, it cannot merely transfer the existing power of the Interstate Commerce Commission to this new commission. It must describe the field within which the new commission shall operate.
>
> • • •
>
> This bill has been drawn with care to safeguard State power to regulate local telephone service. It has been carefully considered by our executive and legislative committee representatives and has met their approval.

*Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 135-36 (1934) (emphasis supplied).

When this representative of the State commissions testified in support of the bill because it "has been drawn with care to safeguard state power to regulate local telephone service," he was talking about what became Sections 2(b) and 221(b), which had no parallel in the Interstate Commerce Act.

As Senator Dill, Chairman of the Senate committee which favorable reported the bill, explained:

*. . . [A]t the request of the State Commission*

> *representatives, we wrote in certain provisions* which are not in the Interstate Commerce Act, *to protect the State commissions* against being overridden by this Commission [the FCC], as the Interstate Commerce Commision has overridden some of the railroad State commissions.

*Hearings on S. 2910 before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 179 (1934) (emphasis supplied).[15]

Given the legislative history of Section 2(b) and Section 221(b) and the fact that these sections were added to the Communications Act of 1934 for the express purpose of safeguarding State jurisdiction over local and intrastate services and facilities,[16] as well as

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15. The reports of both the Senate and House committees explained that Sections 2(b) and 221(b) were intended to reserve to the States "exclusive jurisdiction" over local and intrastate communications. *Senate Report No. 781*, 73d Cong., 2d Sess. 3 (1934); *House Report No. 1850*, 73d Cong., 2d Sess., 4, 7 (1934).

16. The court below recognized that Congress, in enacting the Communications Act of 1934, was dissatisfied with the effect of the *Shreveport Rate Case* doctrine on the Interstate Commerce Act. (Pet. App. 17a). But the court below erred in assuming that Congress and the States were only interested in preserving State jurisdiction over rates. The majority held that since the FCC's registration program in no way purports to prescribe charges for local service, State jurisdiction over "charges" was not impaired. (Pet. App. 19a). However, apart from the fact that Section 2(b) refers to "facilities" in the same phrase as "charges," the history of the Act shows that the States' concern and that of Congress was not limited to rates. John Benton's testimony shows a concern to protect State jurisdiction over intrastate telephone "business," and



charges, a cruel hoax would now be perpetrated on the States if the Act were to be construed as authorizing the FCC to preempt the State commissions with respect to terminal equipment interconnected to the local switched telephone network, and used for or in connection with intrastate communication service.

## II.

### The Court Below Erred in Holding that the FCC's Registration Program does not Nullify State Ratemaking Jurisdiction.

Unlike the FCC's orders in *Telerent* which were sustained by the Court of Appeals in *North Carolina I* (*supra*, p. 20) the FCC's orders herein go far beyond a declaratory order which preempts State jurisdiction over facilities because of possible inconsistency with as yet unformulated federal policy. The FCC has now adopted a policy and has implemented that policy by establishing a massive new federal regulatory program which not only supersedes State commission jurisdiction over terminal equipment used for local and intrastate service, but also nullifies State jurisdiction

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over local telephone "service." (*Supra*, p. 31). Senator Dill, chairman of the Senate committee which favorably reported the bill, described the bill as reserving to the States "control of intrastate telephone *traffic*," and as "safeguarding state regulation" over "intrastate telephone *business*." *Hearings on S. 2910 Before Before the Senate Committee on Interstate Commerce*, 73 Cong. 2d Sess. 179 (1934) (emphasis supplied).

Moreover, as shown herein (*infra*, p. 35 *et seq.*), the registration program in fact seriously impairs, if not nullifies, effective State regulation over *rates*. Therefore, even if the States historically had been concerned only with jurisdiction over rates, the registration orders constitute a clear abrogation of the States' authority in that area.

over rates for that service.

The opinion of the court below, and the earlier opinion of the Court of Appeals in *North Carolina I*, taken together, have fragmented jurisdiction over "charges" and "facilities" under Section 2(b) of the Communications Act of 1934. Under this fragmented structure of jurisdiction, the FCC would regulate facilities and terminal equipment used in local and intrastate service, but the State commissions would regulate charges for local and intrastate service.[17] The FCC's registration program at issue in this case is a massive federal intrusion into a highly sensitive area of federal/state regulatory relationships. The court below sustained the registration program on the premise that such fragmented jurisdiction is workable and consistent with the Act, holding that the States "remain unfettered in their discretion to set rates for all local services and facilities provided by the telephone companies." (Pet. App. 17a). According to the court below,

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17. *In Re Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), the FCC expressly recognized that the Communications Act of 1934 preserved the exclusive jurisdiction of the States over local telephone exchange rates and charges. In its opinion and order, the Commission conceded that only the States could regulate intrastate rates:

> [T]he legislative history of the Communications Act clearly shows that in enacting Sections 2(b) and 221(b), the Congress was primarily concerned with the preservation of traditional state jurisdiction over intrastate rates and services . . . .

45 F.C.C.2d at 219. Likewise, in *North Carolina I*, the majority held that the Act left the exclusive jurisdiction over "local telephone *rates* and *charges*" with State regulatory agencies. 537 F.2d at 793, n. 6 (emphasis supplied).



"We hold that the registration program — *as a jurisdictional matter* — does not jeopardize state ratemaking prerogatives . . . ." (Pet. App. 19a) (emphasis in original).

However, as Congress explicitly understood in 1934 when it wrote Section 2(b) into the Act (protecting the jurisdiction of the States over "facilities" as well as "charges" for intrastate service), jurisdiction over local charges and facilities cannot practically be fragmented; and the State commissions must have jurisdiction over facilities and entry into the market for terminal equipment in order to preserve and effectuate State policies with respect to rates and charges.

The FCC's orders at issue in this case would impair, if not totally destroy, the power of the States to pursue their ratemaking policies, at least insofar as the rates for terminal equipment are concerned. *(Supra*, p. 23 *et seq.)*. By permitting free entry into the terminal equipment segment of the telecommunications business, the registration orders necessarily remove the vital underpinning of any effective State regulation in the public interest. No subscriber to telephone service will willingly pay rates including terminal equipment charges substantially in excess of the cost of such equipment, if the same or similar equipment is available at cost-related prices from an unregulated company. If the telephone companies were required to maintain such charges, they would unquestionably lose their terminal equipment business and, with it, the very contribution to basic service which the rate structure was designed to provide. In such a situation, a State regulatory agency could not maintain a ratemaking policy which included the support of basic

residential rates through the imposition of terminal equipment charges in excess of costs.

That such unrestricted entry by unregulated suppliers renders State regulation ineffective can hardly be questioned. This Court has expressly recognized that unregulated competition effectively undercuts regulation in any market in which it is permitted. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329 (1951); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507 (1947). Both of these cases involved efforts by users of natural gas to circumvent State regulation by purchasing gas directly from out-of-state producers on the theory that such interstate sales were beyond the jurisdiction of State regulatory agencies. Since such direct sales would have undercut the rate structures established for natural gas in both of these States, the State regulatory agencies involved moved forcefully to protect their rate structures.

In the *Panhandle-Indiana* case, the regulatory agency asserted State jurisdiction over the direct interstate sales. In upholding this assertion of State jurisdiction, this Court explicitly recognized that such jurisdiction was necessary for effective State regulation of intrastate sales of natural gas:

> The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state



> regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. *Public Utilities Comm'n v. Gas Co.*, 317 U.S. 456, 467; *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 609-610; *Interstate Gas Co. v. Power Comm'n*, 331 U.S. 682, .... The scheme was one of co-operative action between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses.*
>
> *Over 38 percent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trival percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies.

332 U.S. at 520-21.

In the *Panhandle-Michigan* case, the regulatory agency completely prohibited the contemplated interstate sales. Again this Court upheld State regulation, pointing out:

> Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of 'essentially local' concern and of vital interest to the State of Michigan.

341 U.S. at 334.

The significance of the *Panhandle* cases does not depend upon a contention that the natural gas and telecommunications industries are entirely alike (because they are not) or that the Natural Gas Act and the Communications Act of 1934 establish parallel regulatory structures (because they do not). Rather, this Court's holding in both *Panhandle* cases was predicated on a much broader principle — the principle that where Congress has created a dual regulatory scheme involving both state and federal regulating, a statute must be construed to permit *effective* regulation in their respective spheres by both the state and federal agencies. The telecommunications industry does not differ from the natural gas industry in this critical respect; sales by unregulated companies in



unrestricted competition with regulated common carriers will inevitably drive the price of terminal equipment down to cost-related levels. Such a market situation will render the State regulatory agencies' acknowledged ratemaking power ineffective, or what is worse, actually counterproductive. Any effort to regulate prices in a competitive environment can only place the regulated companies at a disadvantage *vis-a-vis* their unregulated competitors and hurt, rather than help, the regulatory agencies' efforts to achieve their public interest objectives.[18]

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18. The dependence of effective State rate regulation upon the power of State regulatory agencies to exercise traditional ratemaking powers with respect to telephone facilities was explained in testitmony before a Senate committee investigating broad aspects of the telecommunications industry by Professor Cyrus J. Colter, a member of the Illinois Commerce Commission for more than 23 years:

> At present, the state regulator is able to design rates in a way that the charge for the basic services — i.e., for the use of his telephone by the average householder — is held low, while other charges, such as for terminal facilities, extensions, PBX's, etc., are kept higher. Also, residential rates are invariably kept lower than business rates. These rate policies are not new, but historical, and have served the nation well.
>
> But now these new — and I can only call them selfish — interests have appeared with the clear intention of underpricing in those special areas in which regulators have heretofore kept the prices higher; kept them higher in order to provide lower, though reasonable, charges for the great body of household telephone users across the country. Such competition may be good for these special interest entities which are not at all averse to competing with a regulated system. But it is not good, in my opinion, for the American public, especially the part of it which is economically disadvantaged — the unfortunate.

Thus the registration program portends serious disruption of State ratemaking methodology and policies — particularly in the States represented herein. As has previously been noted (*supra*, p. 7 *et seq.*), for decades many States have pursued policies designed to further the availability of telephone service to residential users. In some States, this policy has been pursued so successfully that there are relatively few families so poor that they cannot afford to have a telephone. In such States, it may be that State regulatory commissions would consider the success of that policy in deciding whether to allow interconnection of customer-provided equipment or whether to make other adjustments in the rate structures which would have the effect of raising the rates for residential service. The State of California already appears to be moving in this direction. *See Investigation . . . into the Promulga-*

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> It ties the regulator's hands as he attempts to set rates which will meet overall public interest standards — and especially the needs of the poor, the elderly, and the ill. To allow selective entry into this market by, for example, the specialized common carrier can only result in a further dislocation of present tenuous regulatory rate options. Regulators would then have no choice but to give greater weight than formerly to the cost of serving each class of customer with the result that a steeper rate of increase to the lower-income telephone user would be inescapable. Some may ask, "What's wrong with that? This customer is only being asked to pay his fair share — what it costs to serve him." What in my opinion, is wrong with it is that it lacks the input of responsible government with a social conscience — without which a government will not long be governing.
>
> *Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 5, at 3812-13 (1974).



*tion of a General Order Providing for . . . the Interconnection of a Customer—Opinion and Order*, Case No. 9625, California P.U.C. (April 22, 1975). However, in many of the States represented by SEARUC, the goal of universal service has not yet been fully achieved. In Mississippi, for example, nearly 20 percent of the households are still without any telephone service at all, and many others must rely upon shared party line service. Other States have similar problems, not only those in the predominantly rural areas of the South but also those elsewhere. Thus, whatever the policies of the richer States of the Nation, the regulatory commissions of the States represented herein should not be foreclosed from exercising their jurisdiction so as to maintain rate structures calculated to make it easier for families to afford telephone service.

Whatever else one may say about the Communications Act of 1934, in particular Sections 2(b) and 221(b) of that Act, and the legislative history of those sections, it is plain that Congress did not propose to authorize the FCC to disable the State commissions from performing their historic functions of regulating local matters, including rates. Sections 2(b) and 221(b) of the Act make it clear that Congress did not intend to supersede the State commissions in the sphere of local and intrastate rates, and that it did not intend for the FCC to exercise its regulatory authority so as to nullify State commission policies with respect to those rates.

## III.

## This Court Should Grant Certiorari to Vindicate Basic Principles of Federalism.

At bottom, this case does *not* present any question

as to whether competition rather than regulation with respect to terminal equipment is in the public interest. Rather, it presents the issue of which level of government — federal or state — is authorized, under the Communications Act of 1934, to decide what is in the interest of the public which uses telecommunications service.

The decision of the court below appears to have turned less on statutory language than on an unarticulated premise that any entity as large and complicated as our national telephone network somehow must be regulated in its entirety by a federal agency, rather than a multitude of State commissions. No premise could be further from the truth. Our national telephone network is, in fact, made up of hundreds of local telephone companies and exchanges, all with different markets, customer needs and service problems. In 1934 these facilities were used approximately 98% of the time for local or intrastate calls; today approximately 97% of all calls are local or intrastate. In recognition of this fact, Congress attempted in Sections 2(b) and 221(b) to preserve State regulatory jurisdiction over this predominantly local variety of service. As already pointed out (*supra*, pp.17-18), the FCC itself recently recognized that Congress in enacting the 1934 Act had properly decided that "the tail should not wag the dog." *General Telephone Co.*, 14 F.C.C. 2d 695, 696 (1968).

We have in this country telephone communications systems of unsurpassed excellence and efficiency, and we have built and maintained these systems — since the very beginnings of the industry, and certainly in the four decades since 1934 — almost exclusively under State regulation. This record of State regulation of predominantly local and intrastate telecommunications



service certainly compares favorably, to say the least, with the results of federal agency regulation of such predominantly interstate carrier services as railroad transportation and the airline industry.

The right of the States in our federal system to adopt policies reflecting local conditions and local views as to what promotes the public interest, and to experiment in implementing these policies, should be preserved. Our system of government is founded on the belief that progress will most likely be achieved, and stagnation avoided, not by a single, monolithic government or governmental rule, but by a multitude of governments — with the States and local governments free to adopt policies reflecting local conditions and local views as to what promotes the public interest. This belief has nowhere been better expressed than by Mr. Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts. [Footnote omitted].
>
> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a labora-

> tory; and try novel social and economic experiments without risk to the rest of the country.

This Court has vindicated[19] the views of Justice Brandeis and has emphasized the importance, in construing federal regulatory statutes, of protecting the regulatory powers of the State commissions. Thus, in *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945), this Court held that in enacting the Federal Power Act, Congress had preserved the power of the States to devise their own regulatory policies for dealing with local public utilities. In doing so, this Court emphasized the importance of State regulation as providing "laboratories" for testing regulatory policies:

> But state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed.
>
> • • •
>
> Congress may think complete centralization of control of the electric industry likely to overtax

19. Although the *New State Ice* case has never expressly been overruled, this Court has recognized that Mr. Justice Brandeis' dissent, rather than the majority opinion, states the correct interpretation of the Due Process Clause and accurately describes the power of the States to regulate public utilities. *See Nebbia v. New York*, 291 U.S. 502 (1934); *Breard v. Alexandria*, 341 U.S. 622, 630-33 (1951); *Fay v. New York*, 332 U.S. 261, 296 (1947). *See also Johnson v. Louisiana*, 406 U.S. 356, 376 n.16 (1972) (concurring opinion of Mr. Justice Powell).



> administrative capacity of a federal commission. It may, too, think it wise to keep the hand of state regulatory bodies in this business, *for the "insulated chambers of the states" are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.*

324 U.S. at 530 (emphasis supplied).

Moreover, these cases, and many others, reflect the further principle that even where federal power exists both under the Constitution and as reflected in congressional legislation, the exercise of such power and any economic consequences, must be carefully weighed and thoroughly justified where encroachment upon the powers of the States may result. Given the broad sweep of federal constitutional powers and the generality of the language of many federal statutes, this principle is critical to the maintenance of a viable federalism. Without it, federal agencies acting under broad mandates could render the States and their governmental agencies impotent to deal with any matter remotely relating to a subject covered by federal law, even though Congress specifically intended that the States should continue to play a meaningful role with respect to that subject, and even though all proper federal responsibility could be discharged without interfering with effective State regulation. There are no findings in any of the Commission's reports in this case that remotely address this basic concern for the principles of federalism, or even undertake to gauge the potentially significant, and irretrievable economic impact of its decision.

The FCC's findings with respect to the adequacy

of its registration program to protect the nationwide telephone network do not justify the invasion of the States' ratemaking powers that result from these orders, especially where economic consequences that are certain to occur are ignored or are left to another proceeding. The mere fact that equipment has been certified as technically adequate for interconnection to the nationwide switched telephone network does not justify orders *requiring* the States to permit the interconnection of such equipment without regard for the economic consequences of such interconnection, and without regard to the effect of such interconnection upon State ratemaking policies.[20]

20. Judge Widener, in a vigorous and well-reasoned dissent from the opinion below, decried the failure of the FCC to provide any reasoned analysis or basis for embarking on such a massive and largely irreversible program:

> [W]e abdicate our responsibility as a reviewing court when we fail to insist that regulatory action, once taken, results from a process of fair, reasoned decision-making. *International Harvester Co. v. Ruckelshaus*, 478 F2d 615 (D.C. Cir. 1973); *Greater Boston Television Corp. v. FCC*, 444 F2d 841 (D.C. Cir. 1970), cert. den., 403 U.S. 923 1971). To that end, basic principles of administrative law have evolved that require such agencies as the FCC to make necessary supportive findings of fact, *Saginaw Broadcasting Co. v. FCC*, 96 F2d 554 (D.C. Cir. 1938), cert. den. 395 U.S. 613 (1938), and to "articulate with with reasonable clarity its reasons for decision, and identify the significance of crucial facts." *Greater Boston*, at 851.
>
> Here, while the grounds upon which the Commission acted are not left to our speculation, and we are advised as to the facts before the Commission when it acted, both are manifestly inadequate to support the far-reaching regulatory action taken. *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); see *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The serious and thus far unrefuted claims of adverse economic effect advanced by the petitioners, the Commission's fundamental statutory obligation to oversee the provision of the communication services at reasonable charges to "all the people of the United States," and the equally basic duty of an agency to consider all pertinent public interest factors properly before it in exercising its rulemaking or adjudicatory functions, dictate that the FCC be required to conduct an inquiry into potential impact on telephone rates to the public prior to embarking on this expensive, risky, uncertain, and largely irreversible course.

(Pet. App. 37a-38a) (footnotes omitted).



The plain fact is that questions of technical standards are quite different from questions of ratemaking policy, and the FCC's reports simply do not address questions of economic impact and ratemaking policy.[21]

21. As is pointed out herein (*supra*, p. 25), the economic consequences of interconnection were not the subject of Docket No. 19528, which docket resulted in the registration orders. Rather, economic consequences were to be explored in a separate proceeding, Docket No. 20003. But even Docket No. 20003 provides no support for the registration program. First, the FCC decided that the registration orders should be implemented before it concluded Docket No. 20003. This resulted in the strange procedure whereby the regulatory cart was permitted to go before the horse. Second, Docket No. 20003 was designed to study the economic impact of interconnection on *federal* ratemaking policies. It did not purport to address the question of the disruptive impact of interconnection on State ratemaking policies; nor are those policies currently subject to re-examination in comparable State proceedings. Finally, Docket No. 20003 dealt with the broad policy and economic implications of interconnection, rather than the economic impact of the registration program itself. For this reason, the court below declined to consider either the accuracy of or the evidence supporting the first report in Docket No. 20003, which was released after argument but prior to the decision below. (Pet. App. 10a).

How is the principle of universal service to be implemented in each of the States affected by the FCC's registration orders? Will deregulation of terminal equipment and the consequent loss of contribution to basic telephone service substantially increase the rates necessary to support such basic service in any State? If so, are the people of those States in a position to absorb such rate increases without a substantial reduction in the number of households to which telephone service will be available? If not, are there alternative ratemaking policies that can be pursued by the State regulatory agencies to reduce or offset the effect of deregulating terminal equipment? If existing rate structures do not depend to a substantial extent upon contribution from terminal equipment rates and charges in any particular State, what will be the effect in that State of depriving the State regulatory agencies of the power to establish such a rate structure in the future, should it be needed to support basic service?

The FCC's reports deal neither with these nor with many other questions that are critical to an informed exercise of ratemaking powers by any regulatory agency. The FCC's reports reveal no consideration at all of the specific policies that have been developed by the various States to promote the availability of telephone service to all; nor is consideration given to the universal service mandate of Section 1 of the Communications Act of 1934, which requires the FCC to exercise its powers so as to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151.



The only reasoning in support of the registration program is the FCC's implicit premise that registration can be justified as furthering competition in the market for terminal equipment. Yet this Court has squarely held that competition may not be made the sole basis for a regulatory agency's action, or for its refusal to consider other factors which affect the public interest. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91-97 (1953); *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771-77 (D.C. Cir. 1974). *See also McLean Trucking Co. v. United States*, 321 U.S. 67, 78-88 (1944). Thus, the FCC simply may not conclude without further analysis, that its registration program is justified because it promotes competition in the field of terminal equipment. It should have gone beyond such simplistic reasoning and considered the adverse consequences, economic and otherwise, of its actions. Yet, because of its narrow focus on promoting competition and on avoiding technical harm to the switched telephone network, it did not engage in such analysis.

It is thus important that the basic issue of federal/state jurisdiction in this area be conclusively resolved by this Court. In the absence of such resolution, FCC efforts to undermine and preempt State jurisdiction will continue, leading to further controversy and litigation over the parameters of federal/state jurisdiction. The Communications Act of 1934 should not properly be read to permit any federal encroachment upon State ratemaking powers. But surely, even if such encroachment could be permitted in special circumstances, the Act forbids emasculation by the FCC of State ratemaking powers without any reasoned explanation of why it is being done, why it is necessary,

what economic consequences will evolve and how the States can properly discharge their responsibilities consistent with such encroachment.

## Conclusion

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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May 27, 1977

Nos. 76-1675, 76-1676, 76-1677 and 76-1814

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1977

NORTH CAROLINA UTILITIES COMMISSION, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.

UNITED SYSTEM SERVICE, INC., ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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No. 76-1675

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a)[1] is reported at 552 F.2d 1036. The opinions of the Federal Communications Commission are reported as follows: the First Report and Order (Pet. App. 1b-58b) is reported at 56 FCC 2d 593; the Second Report and Order (Pet. App. 1c-26c) is reported at 58 FCC 2d 736; the Memorandum Opinion and Order released February 13, 1976 (Pet. App. 1d-26d) is reported at 57 FCC 2d 1216; the Memorandum Opinion and Order released March 15, 1976 (Pet. App. 1e-34e) is reported at 58 FCC 2d 716; and the Memorandum Opinion and Order released April 28, 1976 (Pet. App. 1f-13f) is reported at 59 FCC 2d 83.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 1g) was entered on March 22, 1977. The petitions in Nos. 76-1675, 76-1676 and 76-1677 were filed on May 27, 1977. The petition in No. 76-1814 was filed on June 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Federal Communications Commission acted properly when it established a nationwide registration program for the attachment of both carrier-provided and customer-provided terminal equipment to the interstate telecommunications network.

[1] "Pet. App." refers to the separate appendix filed in No. 76-1677.



## STATEMENT

### A. The Statutory Scheme

The Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, gave the Federal Communications Commission authority to regulate "interstate and foreign commerce in communication by wire and radio," and Congress directed the agency to make available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (Section 1, 47 U.S.C. 151). The grant of jurisdiction covers not only the transmission of interstate and foreign communications but also "all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission" (Section 3(a), (b), (e) and (f), 47 U.S.C. 153(a), (b), (e) and (f)).

The Act contemplates dual regulation of wire communications. Although it preserves exclusive state jurisdiction over exclusively intrastate matters (Section 2(b), 47 U.S.C. 152(b)), it gives the FCC authority for certain purposes over all carriers that engage in interstate communications, including carriers that do so only through interconnection with other carriers (*ibid.*). Such "connecting carriers" thus are subject to state regulation in their roles as intrastate companies and are subject also to the major substantive provisions of the federal Act. Almost all

carriers are subject to federal regulation as "connecting carriers."

### B. FCC Regulation Of Equipment Interconnection

The FCC has consistently exercised its jurisdiction over facilities used for interstate communications, recognizing that the States have concurrent jurisdiction to regulate the use of the same facilities for intrastate communications when the state regulations do not conflict with federal ones. The FCC from its inception has regulated terminal equipment used in connection with the interstate network. The telephone companies have recognized that authority; they typically file equipment interconnection tariff restrictions (formerly known as "foreign attachment" provisions) with the FCC and file conforming tariff provisions with the state or local agencies concerned.

The Commission's regulation of equipment interconnection is authorized by Sections 2(a) and 201 to 205 of the Communications Act, 47 U.S.C. 152(a) and 201-205. For example, Section 201(b) requires that charges, practices and regulations governing interstate communications be "just and reasonable." Section 201(b) gives each telephone subscriber a right "reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 269 (C.A.D.C.).

Early Commission decisions recognized this right,[2]

[2] See, *e.g.*, *Use of Recording Devices*, 11 FCC 1033, 12 FCC 1005, and *Jordaphone Corp.* v. *American Telephone & Telegraph Co.*, 18 FCC 644.



which received its most thorough treatment in 1968 in *Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571. *Carterfone* established the customers' right to attach their own equipment to the interstate network, so long as the interconnection would not harm any telephone company's facilities or employees and would not interfere with the right of others to use the system.

No party sought judicial review of *Carterfone*. Petitioner American Telephone & Telegraph Co. filed tariffs allowing subscribers to attach all types of equipment and communications systems to the public network. The new tariffs, however, specified that electrical connection could be made only through a carrier-provided connecting arrangement.

The Commission was concerned that the connecting arrangement restrictions might be an undue interference with the customer's right to make beneficial use of the telephone network. Therefore, although it permitted the revisions to become effective, the Commission withheld approval of the tariffs and took steps to ascertain what further changes might be necessary, desirable, and technically feasible. *American Telephone & Telegraph Co. (Foreign Attachments)*, 15 FCC 2d 605, 610, reconsideration denied, 18 FCC 2d 871. In 1972 it opened formal proceedings (Docket No. 19528) to continue its investigation.[3]

[3] *Notice of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board, Interstate and Foreign MTS and WATS*, 35 FCC 2d 539. Shortly after the inquiry began, petitioner North Carolina Utilities Commission gave notice

After a comprehensive examination of the massive record, the Commission reached three major conclusions (Pet. App. 11b, 5c, emphasis added):

> *First*, the present tariff provisions requiring the use of carrier-supplied connecting arrangements impose an unnecessarily restrictive limitation on the customer's right to make reasonable use of the services and facilities furnished by the carriers. *Second*, they constitute an unjust and unreasonable discrimination both among users (or classes of users) and among suppliers of terminal equipment. *Third*, the standards and procedures prescribed herein for the registration with this Commission of protective circuitry and/or terminal equipment will provide the necessary minimal protection against network harm * * * and will serve the public interest.

The Commission established a terminal equipment registration program. Under this program terminal equipment must comply with certain standards and technical requirements in order to be registered.[4] The

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of a proposed rule that would generally prohibit connection of customer-owned or customer-provided equipment to the communications system of any telephone company doing business in North Carolina. Upon complaint of several parties that this rule was inconsistent with federal policy, the Commission issued a declaratory ruling holding that its connection policy takes precedence over conflicting state policies. *Telerent Leasing Corp.*, 45 FCC 2d 204, affirmed *sub nom. North Carolina Utilities Commission* v. *Federal Communications Commission*, 537 F.2d 787 (C.A. 4), certiorari denied, December 13, 1976 (Nos. 76-331, 76-332 and 76-336).

[4] Initially the registration program was made applicable only to data, ancillary, and extension telephone equipment. After taking more comments, the Commission included in the program PBX, key telephone and main station telephone equipment (Pet. App. C).



requirements establish tolerances that ensure that complying equipment will not harm the network. Manufacturers can register either (a) the design of the terminal device itself or (b) the design of any special circuitry that would protect the network and be used in conjunction with terminal equipment.[5] Registered equipment may be connected directly to the network without the necessity of a carrier-provided connecting arrangement.[6]

Petitioners had asked the Commission to defer decision until it had analyzed all economic consequences that might occur if large numbers of subscribers elected to use their own equipment instead of leasing from the carriers. The Commission responded that subscribers had had the right to substitute their own equipment since 1969 under the post-*Carterfone* tariffs, and that any economic concerns would flow from the *Carterfone* interconnection policy rather than from the registration program. The economic consequences of customer interconnection were, moreover,

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[5] The Commission offered the option to register protective circuitry as a means of decreasing the cost of compliance (Pet. App. 12b). Many features of the Commission's registration program were patterned after existing telephone company practices (*id.* at 9b-10b).

[6] The Commission decided not to exclude carrier-supplied equipment from the program, finding that carrier-provided equipment was just as capable of causing harm to the network as was customer-provided equipment, and there was no sufficient reason to distinguish the two (Pet. App. 15b).

under study in another Commission proceeding, *Notice of Inquiry, Customer Interconnection in Docket 20003*, 46 FCC 2d 214. See Pet. App. 14b-15b; Pet. App. 6c-8c.

The Commission also concluded that the carriers' loss would be "minimal" (Pet. App. 15b n. 10) in light of the carriers' persistent contention that the purpose of connecting arrangements was to insulate the network from damage rather than to raise significant revenue or to discourage interconnection (Pet. App. 9c-10c).[7] Nevertheless, the Commission indicated that any carrier would be relieved of interconnection obligations if it could demonstrate the need to restrict specific instances or classes of interconnection on the grounds of economic injury (Pet. App. 14b). No carrier has attempted to make such a showing.[8]

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[7] Petitioner AT&T requested the Commission to stay the registration program. It asserted that it would have to expend some $350 million in order to comply. The Commission ruled that this "unsupported estimate of cost by a party which has consistently opposed any registration program" did not provide an adequate basis for delay (Pet. App. 19d). Moreover, the Commission had made and continues to make adjustments in the program to reduce its costs (AT&T has since reduced its estimate of loss to $94 million). The FCC envisions that compliance will be relatively "inexpensive," and any costs are justified by the public interest (Pet. App. 16b). The estimate of low compliance costs is shared by GTE, the nation's second largest telephone company (Pet. App. 4d). See Pet. App. 28a n. 23.

[8] One carrier, Mebane Home Telephone Co. of North Carolina, petitioned the Commission to exempt it from the new rules. The Commission reviewed Mebane's petition and found that it had failed to provide enough economic data to support its allegation of economic injury. Nonetheless, the Commission afforded Mebane the opportunity to establish in a hearing "that it has good cause for an exemption or waiver from the obligation it is now under." *AT&T (Mebane)*, 53 FCC 2d 473, 481, affirmed without opinion *sub nom. Mebane Home Telephone Co.* v. *Federal Communications Commission*, 535 F.2d 1324 (C.A.D.C.). The hearing was terminated at Mebane's request prior to the introduction of evidence. Mebane has not sought further relief from the Commission.



### C. The Ruling Below

A divided court of appeals affirmed (Pet. App. A).[9] The court recognized that it had already rejected petitioners' argument that the FCC lacks the authority to regulate the connection of terminal equipment. *North Carolina Utilities Commission* v. *Federal Communications Commission*, 537 F.2d 787 (C.A. 4), certiorari denied, December 13, 1976 (Nos. 76-331, 76-332 and 76-336) ("*NCUC I*"). Nevertheless, the court again addressed the question. For a second time it concluded that "the Communications Act grants the FCC, rather than the states, primary authority over terminal equipment used for both interstate and local communications" (Pet. App. 26a-27a).

The court held that the statutory prohibition against federal regulation of intrastate facilities does not

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[9] Judge Widener initially stayed implementation of the Commission's orders (Pet. App. 1j). The stay was modified by the full panel to permit the Commission to implement its program as applied to customer-provided data and ancillary equipment (*e.g.*, answering devices) other than extension telephones (Pet. App. 9j). This partial stay continues in effect pending this Court's decision (Pet. App. 13j).

prevent the FCC from regulating facilities used, in part, for interstate communications; it simply prohibits the FCC from regulating "facilities 'separable from and * * * not substantially affect[ing] the conduct or development of *interstate* communications'" Pet. App. 14a). The court observed that to construe the statute to deny the FCC authority over jointly used facilities would sap it of power not only to improve the national network but even to protect the network's integrity against actions by States or others that might interfere with interstate transmissions (*id.* at 15a-16a).[10]

The court held that the Commission had ample authority to require the registration of both customer-supplied and carrier-supplied terminal equipment. The court rejected petitioners' argument that the Commission could not act without explicit statutory authorization, relying on the strong precedent establishing that Congress gave the Commission broad authority to fashion policies and programs to

[10] The court recognized that the FCC could not control the rates for exclusively local service just because those rates may be related to interstate rates (Pet. App. 16a-17a). It did not, however, accept petitioners' contention that federal control of the attachment of customer equipment would deprive the States of "meaningful" ratemaking power by hindering their ability to arrange to subsidize favored types of service. The court found that the States remained "free to approve the pricing of carrier-supplied terminal equipment above or below unit cost" and could still cross-subsidize services by establishing "differential charges for services where there is no competition" (Pet. App. 19a).



achieve its general statutory goals (Pet. App. 25a-26a).

Finally, the court rejected the claim that the FCC erred by not considering the economic consequences of the registration program. It found that petitioners were really concerned only about the consequences of the *Carterfone* interconnection policy, which has been in effect since 1969, and not the economic consequences of the registration program itself (Pet. App. 29a).

The court held that the Commission had fulfilled its responsibility to consider the economic effects of the registration program.[11] Moreover, it held the Commission's decision to implement the registration program before completing its investigation (in Docket 20003) of the long-term economic impact of the interconnection policy was a reasonable one in light of the undisputed illegality of the present tariffs, the lack of evidence of economic effects from interconnection during the last eight years, and the Commission's willingness to grant appropriate relief to carriers that demonstrate actual harm (Pet. App. 33a-35a).

## ARGUMENT

Petitioners repeat in substantial measure the arguments they made in *North Carolina Utilities Commis-*

[11] The Commission had already taken steps to reduce substantially the costs of complying with the registration program, and the court saw no reason why continued cooperation between the FCC and the carriers would not keep such expenses to a minimum. See note 7, *supra*. The court found no warrant for disturbing the Commission's judgments that the compliance costs would be minimal and justifiable in light of the public benefits anticipated (Pet. App. 27a-29a).

*sion* v. *Federal Communications Commission*, 537 F.2d 787 (C.A. 4) ("*NCUC I*"). The Court denied certiorari in that case on December 13, 1976 (Nos. 76-331, 76-332 and 76-336), and there is no greater reason to grant review now. Indeed, there is less, for two other courts of appeals now have endorsed the holding of *NCUC I* that the FCC has the authority to regulate the connection of terminal equipment to the telephone network. See *Puerto Rico Telephone Co.* v. *Federal Communications Commission*, 553 F.2d 694 (C.A. 1); *California* v. *Federal Communications Commission*, C.A.D.C., No. 75-2060, decided June 20, 1977. There is no conflict among the circuits.[12]

[12] *Puerto Rico* affirmed a FCC order prohibiting the Commonwealth of Puerto Rico from barring attachment of customer-owned equipment to the system. *California* concluded that the FCC has authority over foreign exchange and common control switching arrangement facilities that are used for both interstate and intrastate communications.

*California* demonstrates that petitioners' reliance on two earlier decisions of the District of Columbia Circuit was unwarranted. That court had not thoroughly considered the matter until *California*, and there it endorsed the FCC's position. The earlier cases, in any event, offered little support to petitioners. In *National Association of Regulatory Utility Commissions* v. *Federal Communications Commission*, 533 F.2d 601 (C.A.D.C.), Judge Wilkey, speaking only for himself, concluded that Section 2(b) precluded FCC jurisdiction over intrastate point-to-point cable communications. But in that case, unlike the present one, there was no apparent interstate nexus to support federal jurisdiction. The point-to-point communications began and ended within the same state; terminal equipment, by contrast, may promptly be connected by the network to other terminals anywhere in the world. *Kitchen* v. *Federal Communications Commission*, 464 F.2d 801 (C.A.D.C.), affirmed the Commission's ruling that it lacked jurisdiction to halt construction of a building designed to hold a telephone exchange facility, because a building is not a "line" within the meaning of Section 214, 47 U.S.C. 214. The court's statement in that opinion that Section 221(b) also would bar FCC jurisdiction is *dictum*. It was the Commission's position in *Kitchen* that the construction of an exchange building in a residential area, having no effect on interstate communications, was a question for a local zoning board rather than a federal regulatory agency. In contrast, the issues involved here relate directly to the Commission's responsibility for the effectiveness of the national telephone system, and thus are entirely appropriate for its consideration.



The Commission's policy is long standing. Any change in this policy should be made by Congress rather than the courts. Petitioners support a bill that would alter the FCC's policy, and this Court should leave petitioners to the pursuit of that legislative remedy.[13]

1. *a.* Congress established the Federal Communications Commission in 1934 and gave it a mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *." 47 U.S.C. 151. It authorized the Commission to regulate not only interstate services but also the facilities used to provide such services. 47 U.S.C. 152(a), 153(a), (b), (e), (f). To ensure that its regulation was effec-

[13] *See, e.g.*, S. 530, 95th Cong., 1st Sess. (1977); H.R. 8, 95th Cong., 1st Sess. (1977). These and other bills would end the Commission's authority to regulate the attachment of terminal equipment. Similar bills were introduced in the last session of Congress. Although hearings were held on them, they were not reported out by committee.

tive, Congress expressly made Sections 201 through 205 of the Act applicable to local telephone companies providing interstate service only through connection to other telephone companies. 47 U.S.C. 152(b).

All the telephone companies that are parties to this case are "integrated into the national network and subject to the provisions of section 201 through 205." *NCUC I*, *supra*, 537 F.2d at 792. The Commission's equipment interconnection policy and rulings apply to these companies because Section 201 of the Act requires that their charges and practices (including restrictions on interconnection) be "just and reasonable." See *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 268 (C.A.D.C.)."

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[14] The court below correctly disposed (Pet. App. 25a-26a) of petitioners' contention, briefly renewed here (Pet. No. 76-1677, pp. 25-27; Pet. No. 76-1814, pp. 26-29), that the FCC lacks authority to require the registration of carrier-provided equipment because the power is not specifically mentioned in the Act. Congress gave the FCC "expansive powers." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. Congress did not attempt to catalogue all practices subject to FCC regulation, and the omission of an explicit grant of power does not give rise to an inference that the Commission's general grant of power does not reach carrier-provided equipment. Petitioners' alternative argument (Pet. No. 76-1677, pp. 28-30; Pet. No. 76-1814, pp. 30-32) that the registration of carrier-provided equipment violates the prohibition against acting solely for the purpose of increasing competition (*Federal Communications Commission* v. *RCA Communication, Inc.*, 346 U.S. 86) founders on the fact that the Commission's primary reason for including carrier-provided equipment in the program was the fact that such equipment has "the same *potential* for harm to the network as does customer-supplied equipment" (Pet. App. 15b, emphasis in original). This, coupled with the other benefits of having a uniform national program, is a proper justification for this aspect of the program.



Nonetheless, petitioners assert that Sections 2(b) and 221(b) of the Act, 47 U.S.C. 152(b) and 221(b), immunize telephone companies from federal regulation of facilities used for *both* interstate and intrastate communication. This interpretation is unsound. Reading Section 2(b) to deprive the Commission of the authority to regulate such joint facilities would frustrate the Act's overall aim, "to make available, * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Congress intended that the interstate and international communications network be subject to national control, and it gave the Commission the power to assert that control. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

Petitioners' argument, if accepted, would mean that the terms of connection to the national and international telephone network would be controlled, not by the FCC, but by the 50 States. But "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." *General Telephone Co. of California* v. *Federal Communications Commission*, 413 F.2d 390, 401 (C.A.D.C.), certiorari denied, 396 U.S. 888. If the petitioners were correct, the national telephone network would be unprotected from incapacitation by States and localities exercising economic or

technical regulation of facilities that are used for intrastate as well as interstate communication.[15] As the Supreme Court of Nebraska stated recently in describing the consequences of petitioners' position: "[S]uch a result is, we believe, legally, logically, and practically unsupportable." *Sherdon* v. *Dann*, 193 Neb. 768, 774, 229 N.W. 2d 531, 535.[16]

Petitioners also dispute the court of appeals' interpretation of Section 221(b) of the Act. That court reaffirmed the holding of *NCUC I*, stating that "the legislative history of section 221(b) leaves no doubt

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[15] For example, the Commission would be powerless to protect the network if a state regulatory commission purporting to improve local service should decide to require or allow the interconnection of equipment that in fact could damage the national network (see Pet. App. 15a-16a).

[16] Congress is aware that the 50 States combined regulate about 70 percent of the telephone system's plant investment, but that no one State has authority over as much as the approximately 30 percent regulated by the FCC. S. Rep. No. 92-362, 92d Cong., 1st Sess. 3 (1971). Moreover, although the total number of interstate calls made is decidedly smaller than the number of intrastate calls, their importance to the industry and the national communications system is more accurately reflected by the fact that almost $9.5 billion, or 30 percent of total telephone industry revenues, came from interstate or foreign calls in 1975. *Federal Communications Commission, Statistics of Communications Common Carriers*, year ended December 31, 1975, p. 30. In any event, such considerations do not determine the primacy of federal legislative authority under the Supremacy Clause of the Constitution, since it is unlikely that Congress intended to create "a regulatory scheme that depends on the calling habits of telephone subscribers to determine the jurisdictional competence of the FCC versus state utility commissions" (Pet. App. 15a).



that the purpose of section 221(b) is to enable state commissions to regulate local exchange service in metropolitan areas, such as New York, Washington or Kansas City, which extend across state boundaries" (Pet. App. 13a). Section 221(b) provides that a local carrier serving a single multi-state exchange area has "whatever degree of freedom from federal regulation section 2(b) provides for uni-state carriers and intrastate telephone business generally."[17]

Although Section 221(b) does not bar Commission action in this area, it undermines petitioners' interpretation of Section 2(b). If their reading of 2(b) were correct, the "facilities" exemption in 221(b) would be surplusage, because the telephones within a multi-state exchange are also facilities used for intrastate communication and thus would be immune from Commission regulation under Section 2(b) alone.[18]

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[17] Pet. App. 13a, quoting from *NCUC I*, *supra*, 537 F.2d at 795. Congressman Rayburn, floor manager of the 1934 bill in the House, explained that Section 221(b) is "designed to cover cases of cities located within two States, as Texarkana." 78 Cong. Rec. 10314 (1934). The rest of the legislative history confirms this intent. See S. Rep. No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934). As the court below correctly noted, Section 221(b) is not applicable to terminal devices used for interstate comunication, because they are not solely local exchange facilities.

[18] There is no merit in the similar argument (Pet. No. 76-1677, p. 19 n. 27) that petitioners' construction of Section 2(b) is necessary to give meaning to the exclusion of Section 301, 47 U.S.C. 301, from the reservation of state authority over purely intrastate operations. Section 301 requires a Commission license to engage in radio transmission, an activity that Congress meant the Commission to regulate even

*b.* Petitioners incorrectly suggest that the Commission has reversed itself in asserting jurisdiction over terminal equipment and has displaced long-standing state regulation. See, *e.g.*, Pet. No. 76-1677, pp. 5-7, 15. On the contrary, as the court of appeals found, cases spanning the past 30 years "firmly establish the Commission's view that when facilities are used for both interstate and local communication, state regulations must give way to federal regulations even though the latter unavoidably affect local communication in the process of regulating interstate communication" (Pet. App. 21a).

The cases in which the Commission has exercised its jurisdiction in this area are numerous. See *Southwestern Bell Telephone Co.*, 6 FCC 529, and cases at Pet. App. 21a-23a.[19] AT&T in particular has included

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when that transmission was wholly intrastate. Thus Section 2(b) refers to Section 301 to make clear that all radio operation, even that used exclusively intrastate, is within the Commission's regulatory power. There is no similar reference to the other grants of Commission jurisdiction, since wire communication and equipment used exclusively intrastate are not within the Commission's regulatory authority.

[19] See also, *e.g.*, *AT&T (Mebane)*, 53 FCC 2d 473, affirmed *sub nom. Mebane Home Tel. Co.* v. *Federal Communicatinos Commission*, 535 F.2d 1324 (C.A.D.C.); *Department of Defense* v. *General Tel. Co.*, 38 FCC 2d 803, affirmed *sub nom. St. Joseph Telephone & Telegraph Co.* v. *Federal Communications Commission*, 505 F.2d 476 (C.A.D.C.); *Hush-A-Phone Corp.* v. *AT&T*, 22 FCC 112, on remand from *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (C.A.D.C.); *Jordaphone Corp. of America* v. *AT&T*, 18 FCC 644; *Katz* v. *AT&T*, 43 FCC 1328; *AT&T (TWX)*, 38 FCC 1127; *AT&T (Railroad*



restrictions on the use of terminal equipment in its interstate tariffs since before the FCC was created in 1934; those provisions have been the subject of Commission scrutiny a number of times. *E.g.*, *Hush-A-Phone Corp.* v. *United States*, *supra*. The Commission nearly 30 years ago made plain its judgment that it has authority over equipment used in connection with both interstate and intrastate calls when in 1947 it rejected an AT&T argument similar to that now advanced. *Use of Recording Devices*, 11 FCC 1033, 1047.[20]

What is more, AT&T itself once successfully asserted that the FCC had primary jurisdiction over a dispute involving the use of attachments to terminal equipment. The *Carterfone* case began as an antitrust suit by the makers of a device to be attached to a telephone to increase its usefulness. The case was referred by the district court to the Commission on AT&T's motion (*Carter* v. *AT&T*, 250 F. Supp. 188

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*Interconnection)*, 32 FCC 337; *Fallon Travelodge* v. *Churchill County Tel. & Tel. System*, 14 FCC 2d 972; *Department of Defense* v. *AT&T (COPAN)*, 38 FCC 2d 819.

[20] The Commission stated:

> [T]he Bell System argument ignores the real consideration that interstate and foreign message toll telephone service requires the use of facilities that are not 'exclusively interstate.' This service necessarily involves all the facilities, charges, classifications, practices, services, and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved if it is to be effective. This is clearly the purport of the comprehensive common carrier provisions of the Communications Act.

(N.D. Tex.), affirmed, 365 F.2d 486 (C.A. 5), certiorari denied, 385 U.S. 1008). AT&T, not the Commission, has thus reversed itself in now asserting that the Commission has no jurisdiction over matters relating to terminal equipment used for both interstate and intrastate calls.[21]

Nor does the instant decision represent a novel attempt by the FCC to displace state regulation. It is true that federal and state regulation of equipment that is used for both interstate and intrastate calls has coexisted for many years. Because the state agencies and the telephone companies have until now acquiesced in federal regulation of terminal equipment connection by conforming the state policies with the federal policies, there has been no conflict necessitating a declaration of federal primacy. The assertion of federal authority is not new; only the conflict is new. For example, when the Commission in *Carterfone* directed AT&T to file new tariffs modifying earlier restrictions on the use of attachments to terminal facilities for interstate calls, AT&T recognized that uniform practices were required and filed conforming tariffs with the state commissions covering intrastate calls.

*c.* Contrary to petitioners' contentions that the decisions below are at odds with the Act's legislative

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[21] See also *Phonetele, Inc.* v. *Public Utilities Commission*, 113 Cal. Rptr. 16, 520 P.2d 400, where Pacific Telephone & Telegraph Company (an AT&T operating company) argued before the Supreme Court of California that the State should postpone adoption of a certification program pending adoption of national certification standards.



history (Pet. No. 76-1675, pp. 29-32; Pet. No. 76-1676, pp. 16-17), that history does not indicate a congressional intention to deprive the FCC of authority over terminal equipment used in interstate communications. The discussion in the legislative history of *Houston, E&W Texas Ry.* v. *United States*, 234 U.S. 342 ("the *Shreveport* case"), on which petitioners rely, reflects concern on the part of some legislators and some witnesses at the hearings about federal intrusion into *purely* intrastate matters. They read the *Shreveport* case as authorizing the Interstate Commerce Commission to regulate purely intrastate rates, and Congress sought to avoid giving similar power over purely intrastate matters to the FCC. The means they chose to avoid the *Shreveport* result was the explicit reservation in Section 2(b)(1) of purely intrastate matters to local regulatory bodies. But neither that rationale for Section 2(b)(1) nor anything else in the legislative history justifies giving the Act the cramped reading that petitioners urge.[22]

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[22] In the present case the Commission has not sought to regulate the rates charged for intrastate service. Petitioners' contention that the Commission lacks jurisdiction because the right to regulate interconnection will affect cross-subsidies in intrastate rates (Pet. No. 76-1675, pp. 33-41) is groundless. All kinds of Commission regulation of interstate telecommunications may affect rate policies that individual States consider desirable. As the court of appeals properly held, the registration program "no more curtails state ratemaking power *as a matter of statutory jurisdiction* than would the denial of state statutory authority to set rates for interstate calls in order to subsidize local exchange and intrastate services" (Pet. App. 19a, emphasis in original). Moreover, the court of appeals

2. Petitioners' contention that the Commission failed to examine the economic results of the registration program (Pet. No. 76-1677, pp. 30-33; Pet. No. 76-1676, pp. 24-25) is unsound. The court of appeals concluded that "[a] fundamental error infects petitioners' analysis of economic impact: they confuse the economic impact of the *interconnection policy*, which has been in effect since 1969, with the economic impact of the *registration program*" (Pet. App. 29a-30a, emphasis in original). Although AT&T contends that "the registration program creates an 'open door' to customer substitution of terminal equipment" (Pet. No. 76-1677, p. 31), the door had been open under the post-*Carterfone* tariffs for eight years before the Commission adopted the registration program. The FCC therefore was not bound to examine the economic consequences of the use of customer-supplied equipment as if this were a new development. Customer interconnection is a tried and proven fact of life.[23] It thus was proper for the Commission

correctly observed that if States wish to cross-subsidize certain kinds of service, they retain appreciable latitude to do so (*ibid.*).

[23] The Commission found, on opening the present inquiry, that the *Carterfone* policy had been beneficial (see 35 FCC 2d at 542):

> New markets have been opened to the innovative enterprise of many companies; the public has benefitted from having a range of choices available when the individual user selects the terminal device or private system which will best serve his particular communications need; and there has been no actual demonstrable harm to the telephone system or its users.

*Notice of Inquiry, supra*, 35 FCC 2d at 542.



to focus in these proceedings solely on the economic implications of the action contemplated, *i.e.*, implementation of a registration program. Cf. *Aberdeen & Rockfish R.R. Co.* v. *SCRAP*, 422 U.S. 289, 324-325 (Interstate Commerce Commission need not analyze environmental effects of entire railroad rate structure in order to approve an increase; it is enough to analyze the effects of the change).

The Commission designed the registration program so that compliance would impose "minimal" expense or inconvenience upon individual telephone companies (Pet. App. 16b; *id.* at 4d). The Commission further found that its decision would not cause a significant revenue loss for carriers, because it would "affect only the differential costs and revenues associated with customer-provided vis-a-vis carrier-provided protective circuitry and procedures—not with the terminal device *per se*" (Pet. App. 15b n.10). This finding is clearly proper, since the carriers had never contended that the charge for connecting arrangements raised significant revenues or was intended to discourage interconnection; the companies maintained that they used connecting arrangements only as a means to protect the network from harm (Pet. App. 9c-10c). That being so, the FCC was entitled to assume that a shift to a registration policy would not deprive telephone companies of profits from leasing connecting arrangements.[24] Moreover, the Commission provided a safety

[24] This is not a case like *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80. The Commission found, and the court agreed, that the only economic effect attribut-

valve to allow any carrier to seek relief from any substantial hardship it might suffer as a result of its interconnection obligations. The carrier need only file a petition and demonstrate that "compliance with the obligation * * * has already resulted in or will result in direct, substantial and immediate economic injury to [the] telephone system and detriment to the public interest." *AT&T (Mebane)*, 53 FCC 2d 473, 480.

Petitioners' real claim thus must be that *Carterfone* should be overruled and customer interconnection barred or sharply restricted. The Commission has provided petitioners a forum in which to make these contentions in Docket 20003. This Docket, established in 1974, has already produced a *First Report and Order*, 61 FCC 2d 766. The inquiry continues, but the Commission very properly ruled that the pendency of this inquiry was no reason to defer action on the registration program, which is reasonably designed to remedy the carriers' practices of discrimination against, and unreasonable interference with, rights already established in *Carterfone*.

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able to the registration program would be the loss of the insignificant connecting arrangement business; any loss of terminal equipment business "would properly be attribut[able] to the *interconnection policy* which ended the carriers' monopoly over terminal equipment, and not to the *registration program*" (Pet. App. 32a, emphasis in original). The court's brief common-sense observations recognizing the significance of the lack of any evidence of "diminished sales of [carrier-provided] terminal equipment" under the interconnection policy in effect since 1969 (Pet. App. 31a-32a) can hardly be characterized as a post-hoc rationalization.



## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**Nos. 76-1675, 76-1676, 76-1677, 76-1814**

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NORTH CAROLINA UTILITIES COMMISSION, *et al.*,
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

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**On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

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August 9, 1977

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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Nos. 76-1675, 76-1676, 76-1677, 76-1814

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NORTH CAROLINA UTILITIES COMMISSION, *et al.*,
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

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## JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

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## QUESTIONS PRESENTED

The Federal Communications Commission—with the endorsement of reviewing courts—previously determined that telephone companies may not refuse to permit the attachment of customer-provided terminal equipment to the interstate telephone network. In the decision reviewed below, the Commission adopted rules designed to protect the network against potential technical harm from the

attachment of terminal equipment. The rules require that all terminal equipment attached to the network meet certain engineering specifications and be registered with the Commission. The questions presented are:

1. Did the Commission have jurisdiction under the Communications Act of 1934 to establish technical standards and procedures for the attachment of terminal equipment to the network?

2. In establishing rules to govern the attachment of terminal equipment to the network, was the Commission required to exempt equipment furnished by the carriers?

3. Did the Commission give adequate consideration to economic factors in prescribing its new rules?

## STATEMENT OF THE CASE

### A. The Commission Proceedings and Orders

In its 1968 *Carterfone* decision,[1] the Federal Communications Commission (the "Commission" or "FCC") required carriers to permit customers to attach their own terminal equipment ("customer interconnection") to the nationwide interstate telephone network. Since the facilities that make up the network are used interchangeably to make calls both within a single state and across state lines, the necessary result of *Carterfone* was to permit the attachment of customer-provided equipment to facilities used for intrastate as well as interstate service.

*Carterfone* allowed carriers to establish tariff regulations designed to protect against technical harm to the telephone network from customer interconnection. Carriers responded with tariff restrictions that permitted customers to effect attachment only through the use of

[1] 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968).



carrier-provided connecting arrangements ("CAs") and network control signaling units ("NCSUs").[2] This requirement applied even where the customer's equipment being attached was identical to equipment supplied by the carriers and regularly connected to the network without any such special connecting devices. In 1972, the Commission instituted an inquiry—Docket No. 19528—to determine whether the CA and NCSU limitations on customer interconnection contained in the carrier tariffs were just and reasonable or whether there were less restrictive, yet technically feasible, alternatives that would permit users to realize more fully the benefits of customer interconnection without creating a potential for harm to the telephone network.[3]

[2] The Commission never specifically approved the CA and NCSU tariff restrictions imposed by the carriers. It simply allowed them to become effective while it sought additional information as to less restrictive alternatives for protecting the system from harm. *See* discussion n.3 *infra*.

[3] *Notice of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board, Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972). Sensitive to the state interest in interconnection, the Commission also established a Federal-State Joint Board under 47 U.S.C. § 410 to consider and make recommendations based on comments submitted by interested parties.

Even before instituting the formal inquiry, the Commission had instructed the Chief of the Common Carrier Bureau to begin gathering information on possible alternative means to protect the telephone system from technical harm. *See AT&T (Foreign Attachments)*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969). In addition, the Commission retained the National Academy of Sciences and the consulting firm of Dittberner Associates to evaluate possible alternatives that would provide adequate protection for the network. In studies submitted in 1970, both groups concluded that the network could be protected from harm by adopting appropriate standards and implementing them in a certification program. *See Notice of Inquiry*, 35 F.C.C.2d 539 (1972) (Docket No. 19528). Advisory Committees were also established. *See id.; Advisory Committee for Interconnection of Telephone Dialers and Answering Devices*, 33 F.C.C.2d 526 (1972).

In November 1975, the Commission released its *First Report and Order* in Docket No. 19528, declaring unlawful the interstate tariff provisions that required the use of carrier-supplied CAs and NCSUs to attach customer-provided equipment to the national telephone network.[4] The Commission found that such tariff provisions were unnecessarily restrictive and discriminated unjustly and unreasonably among users and among suppliers of terminal equipment. In lieu of such provisions, the Commission prescribed a registration and standardization program under which equipment that is registered with and satisfies engineering standards established by the Commission may be attached to the telephone network without the use of carrier-supplied CAs and NCSUs.[5] The registration program reflects the Commission's distillation and assessment of the voluminous technical and engineering data that had been developed and submitted to it over the years since 1969.[6] It applies to both carrier and non-carrier terminal equipment, although most existing carrier-provided equipment has been grandfathered.[7] In March 1976, the Commission issued a *Second Report and Order*,[8] extending the registration program to certain additional types of terminal equipment.

Petitioners and others petitioned the Court of Appeals for the Fourth Circuit for review of both reports and orders, contending that the Commission had improperly asserted jurisdiction over intrastate communications fa-

[4] 56 F.C.C.2d 593 (1975), Pet. App. at 1b.

[5] The registration program, including its provisions for registration of carrier-supplied equipment, was essentially the same as that recommended by the Federal-State Joint Board instituted by the Commission to consider the interconnection matter. *Recommended First Report and Order*, 53 F.C.C.2d 221 (1975).

[6] *See* discussion p. 3 n.3 *supra*.

[7] *See* 47 C.F.R. § 68.2(b), (c).

[8] 58 F.C.C.2d 736 (1976), Pet. App. at 1c.



cilities, that the Commission was without authority to impose registration requirements on carrier-provided equipment, and that the registration program was invalidly adopted because inadequate consideration was given to its economic impact.

### B. The Decision Below

On March 22, 1977, the court below, one judge dissenting, affirmed the orders of the Commission.[9] Although only eleven months earlier another panel of the same court [10] had considered and rejected the contention that the Commission lacks authority to regulate customer interconnection to facilities used jointly for interstate and intrastate communications, the court fully analyzed and again rejected Petitioners' arguments on this issue. Agreeing with the panel that had earlier considered the issue, the court concluded that if Petitioners' view of the statutory limitations on FCC power were accepted, "the FCC would necessarily be prevented from discharging its statutory duty . . . to regulate interstate communication." [11] Accordingly, it held that FCC regulations "must preempt any contrary state regulations where the efficiency or safety of the national communications network is at stake . . . ." [12]

[9] *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977). The decision also upheld *Memorandum Opinions and Orders* issued by the Commission in 1976 making certain modifications in the registration program in response to carrier motions for reconsideration. 57 F.C.C.2d 1216, Pet. App. at 1d; 58 F.C.C.2d 716, Pet. App. at 1e; 59 F.C.C.2d 83, Pet. App. at 1f. The panel consisted of Judges Tuttle and Rives of the Fifth Circuit and Judge Widener, who dissented.

[10] The panel consisted of the late Judge Hastie of the Third Circuit, Judge Tuttle, and Judge Widener, who also dissented in that case. *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976).

[11] 552 F.2d at 1045.

[12] *Id.* at 1046.

The Court below found that the registration program —as applied to both customer-provided and carrier-provided terminal equipment—was an appropriate exercise of FCC authority to protect the interstate network from technical harm while facilitating enlarged and more efficient use of communications facilities. And the court concluded that the Commission had adequately weighed economic impact factors in reaching its decision.[13]

## REASONS FOR DENYING THE WRIT

Petitioners have failed to present any persuasive reasons why the decision below should be reviewed by this Court. The central question—whether Sections 2(b)(1) and 221(b) of the Communications Act bar the FCC from regulating the attachment of terminal devices to the interstate telephone network—has been uniformly and correctly resolved in the Commission's favor in all the circuits that have considered it. The arguments now advanced anew were insufficient to induce grant of certiorari as recently as last December. *North Carolina Utils. Comm'n.* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976). The most significant development in the intervening period was that two more circuits rejected the claim that the FCC is without jurisdiction to regulate the attachment of terminal equipment to facilities used jointly for interstate and intrastate service.[14]

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[13] Judge Widener dissented as to the major holdings of the court. In his view, the Commission is without power either to regulate interstate facilities also used for intrastate communications or to impose a registration program on carrier-provided equipment, and, in any event, erred in adopting the registration program without first completing a full-scale evaluation of the economic effects of customer-provided terminal equipment on the operations of carriers. 552 F.2d at 1056.

[14] *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *California* v. *FCC*, No. 75-2060 (D.C. Cir. June 20, 1977).



The only element of this case that can be said to present anything new or novel is the challenge to the Commission's authority to require registration of new carrier-provided terminal equipment. But the argument that the Commission must exempt such equipment from a registration program that is otherwise of universal applicability verges on the frivolous. In light of the Commission's statutory authority over interstate communications facilities, its central responsibility to assure rapid and efficient interstate communications service, and the broad construction placed by this Court upon the Commission's role under the Communications Act even in the absence of specific statutory directives,[15] the Commission's authority to include carrier-provided as well as customer-supplied terminal equipment under the registration program cannot seriously be questioned.

Having found that reposing primary responsibility in the carriers to protect the telephone network from harm had produced unjust, unreasonable, and unnecessary restrictions on customer interconnection, the Commission determined that it should assume this responsibility directly and concluded that a registration program was needed to discharge the responsibility effectively. In the Commission's view, failure to include carrier equipment in the registration program on the same basis as customer equipment would ignore the fact that the former presents the same potential for harm to the network as the latter. The wisdom of the Commission's determinations on such technical and engineering-based issues is, of course, not a question for a reviewing court. It is sufficient that—as is obviously the case here—the Commission had a rational basis for the policy it adopted to deal with these technical problems.

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[15] *See National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168, 172 (1968).

The economic impact contention of Petitioners is also unworthy of consideration on certiorari. Petitioners would have this Court believe that the FCC has embarked on a major new regulatory approach that may have disastrous effects on the ability of interstate carriers to serve the public and that the Commission has failed to weigh the economic considerations involved before doing so. The facts are to the contrary.

The Commission's interconnection policy is of long standing and has been accepted by both the carriers and the states; indeed, the 1968 *Carterfone* decision, formulating that policy, was not even appealed. What is at stake here is not a major new policy, but simply the elimination of unjust and unreasonable tariff restrictions on customer interconnection and the substitution of uniform technical standards and registration procedures designed to insure protection of the telephone network from harm. The Commission adequately considered the potential economic impact of the program on carrier revenues (finding this to be minimal) and properly balanced the anticipated costs to the carriers against the public benefits of the program (finding that the latter outweighed the former).

## I. The Courts Have Repeatedly Confirmed that the FCC Has Authority To Regulate the Attachment of Terminal Equipment to the National Telephone Network.

The basic jurisdictional argument that Petitioners seek to raise before this Court on certiorari is precisely the one that they have raised unsuccessfully before the courts on at least five separate occasions during the past two years. In April 1976, a panel of the Fourth Circuit rejected the contention that Sections 2(b)(1) and 221(b) of the Communications Act deprive the Commission of authority to regulate the attachment to the telephone network of terminal equipment that is used to provide both



interstate and intrastate service.[16] Petitioners' subsequent request to this Court for review of that decision on certiorari was denied last December.

Undaunted, Petitioners raised the same jurisdictional argument in the court below, and, in a March 22, 1977 opinion, it was again rejected. Barely a week later, the Court of Appeals for the First Circuit also rejected the same jurisdictional argument. Its decision upheld the Commission's authority to prevent carriers from restricting the attachment of customer-provided equipment to the telephone network even though the equipment would be used in part to provide intrastate service.[17] In June 1977, the District of Columbia Circuit joined the First and Fourth Circuits in affirming the Commission's authority to regulate the interconnection of such equipment.[18] No circuit has taken a contrary position; indeed, these recent decisions—directly on point—were foreshadowed by earlier decisions of both federal and state courts.[19]

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[16] *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976).

[17] *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977).

[18] *California* v. *FCC*, No. 75-2060 (D.C. Cir. June 20, 1977). Petitioners' suggestion that the District of Columbia Circuit might take a view contrary to that of the First and Fourth Circuits (United System Service Pet. at 21-22) is refuted by the recent decision in *California* v. *FCC*.

[19] *See St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974), *aff'g United States Dep't of Defense*, 38 F.C.C.2d 803 (1973); *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956). In *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (Neb. 1975), the Nebraska Supreme Court overturned a Nebraska Public Service Commission order which prohibited interconnection when no state authorization had been obtained. In so doing, the court explained:

> "If each state were to be free to establish its own rules governing interconnections for the purposes of intrastate services, uniform nondiscriminatory interstate services throughout the country would be made difficult, if not impossible." *Id.* at 777, 229 N.W.2d at 536.

The Commission, too, has consistently rejected the contention that Sections 2(b)(1) and 221(b) deprive it of authority to regulate the type of equipment involved here. As early as 1938, the Commission declared that its jurisdiction encompassed facilities used jointly for interstate and intrastate service, even where the intrastate use was predominant.[30] FCC decisions over the years have consistently adhered to this position,[31] with *Carterfone* eventually establishing the right of customers to attach their own terminal equipment to the telephone network even though such equipment would, of necessity, be used in connection with intrastate as well as interstate service. In its post-*Carterfone* decisions, the Commission has continued to assert jurisdiction over facilities and practices in circumstances where both interstate and intrastate service necessarily are involved.[32]

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[30] *See Southwestern Bell Tel. Co.*, 6 F.C.C. 529 (1938).

[31] *See Use of Recording Devices*, 11 F.C.C. 1033 (1947); *Katz* v. *AT&T*, 16 F.C.C. 421 (1951), *rehearing denied*, 43 F.C.C. 1328 (1953); *Jordaphone Corp.* v. *AT&T*, 18 F.C.C. 644 (1954); *AT&T (Railroad Interconnection)*, 32 F.C.C. 337, 339 (1962); *AT&T (TWX)*, 38 F.C.C. 1127 (1965).

[32] *Fallon Travelodge*, 14 F.C.C.2d 972 (1968); *Johnson* v. *Southwestern Bell Tel. Co.*, 18 F.C.C.2d 679 (1969); *United States Dep't of Defense* v. *General Tel. Co.*, 38 F.C.C.2d 803, *review denied*, F.C.C. 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974); *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976).

Petitioners argue that *Carterfone* and, indeed, all Commission decisions prior to the present one were limited, in a strictly formal sense, to the interstate tariffs of telephone carriers. United System Service Pet. at 5-7. But the same is true of the present registration program. And the practical impact on intrastate service that Petitioners complain of here was also present in prior cases. Thus, as the Petitioners themselves recognize (United System Service Pet. at 8), after *Carterfone*, the carriers filed new tariffs for intrastate service with state regulatory commissions that mirrored the new provisions contained in the interstate tariffs filed with the FCC.



State regulatory agencies since 1934 [33] have also recognized the need for uniformity of regulation and the primacy of federal authority and have deferred to the interstate tariffs filed by the carriers with the FCC.[34] Most recently, the Public Utilities Commission of California acknowledged the need for such deference in an opinion adopting a state certification program for terminal equipment:

> "We, as a state regulatory commission, may adopt rules for direct interconnection; however, they may not be more onerous than those adopted by the FCC with its primary federal jurisdiction." [35]

The decision of the court below is thus entirely consistent with both the long-standing pattern of federal and state administrative practice and the decisions of all courts that have considered the jurisdictional point at issue here. This uniform rejection of Petitioners' proposed construction of Sections (2)(b)(1) and 221(b) reflects the obvious lack of merit in their position.

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[33] The pre-1934 decisions of state regulatory commissions which Petitioners cite (AT&T Pet. at 22) shed no light on the division of regulatory authority that Congress established in the Communications Act of 1934.

[34] For example, after the decisions in *Carterfone*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), and *Hush-A-Phone Corp.*, 22 F.C.C. 112 (1957), AT&T modified its state tariffs to make them consistent with the interstate tariff filings.

[35] *Investigation into Customer-Provided Communications Terminal Equipment*, No. 9625, slip op. at 4 (Cal. Pub. Utils. Comm'n July 19, 1977). Similarly, one of the more recent cases cited by Petitioners in support of their position that the states have regulated terminal facilities in a plenary fashion recognizes the secondary role actually played by the states. *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363, 367 (Minn. R.R. & Whse. Comm'n 1965), *aff'd*, No. 8529 (Minn. Dist. Ct. 8th Dist. 1966) (recognizing that the tariffs filed by the carrier with the state commission were modified to be "substantially identical to comparable tariffs filed . . . with the Federal Communications Commission"). *See also Liberalized Interconnection of Customer-Owned Equipment*, No. 26894, slip op. at 4-5 (N.Y. Pub. Serv. Comm'n June 15, 1977) (on rehearing).

Under the Act, the FCC's jurisdiction extends to "all instrumentalities, facilities, apparatus, and services . . . incidental to [interstate or foreign communication.]" [26] And Sections 201 through 205 grant the Commission plenary authority to regulate such facilities and services, as well as related charges and practices involved in the provision of interstate and foreign communications service. This "broad authority" [27] is necessary if the Commission is to discharge its statutory responsibility to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." [28]

Petitioners' reading of Sections 2(b)(1) and 221(b) cannot be reconciled with this broad jurisdictional grant and the comprehensive nature of the Commission's responsibilities with respect to interstate communications service.[29] As the court below emphasized, the registration program prescribes the terms on which terminal equipment may be "used directly to effectuate interstate communication." [30] If the Commission were not authorized

[26] 47 U.S.C. § 153(a), (e), (f).

[27] *United States* v. *Southwestern Cable Co.*, 392 U.S. at 168. Courts have repeatedly held that the grant of jurisdiction to the Commission should be construed expansively "in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole." *General Tel. Co.* v. *FCC*, 413 F.2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

[28] 47 U.S.C. § 151.

[29] Section 2(b)(1), properly construed, precludes the exercise of FCC jurisdiction only over facilities and services that are technically and practically separable from interstate communications service. And Section 221(b), as the court below noted, merely preserves the authority of state commissions to regulate local exchange service in metropolitan areas that straddle state lines, such as New York, Washington, D.C., and Kansas City. *See* 552 F.2d at 1045.

[30] *Id.* at 1048.



to prescribe the terms for the attachment of such equipment to the network, various states might prescribe different and incompatible attachment conditions, thereby creating serious interference with interstate telephone service. It was precisely such a situation that Congress sought to avoid when it created the FCC and charged it with the obligation to insure the availability of "adequate [interstate telephone] facilities at reasonable charges." [31] Although the exercise of FCC jurisdiction over terminal equipment may have an indirect impact on state regulation of intrastate telephone service, that impact does not defeat the Commission's jurisdiction. As the court below noted, "FCC regulations must preempt any contrary state regulations where the efficiency or safety of the national communications network is at stake . . . ." [32]

## II. The Commission Properly Exercised Its Jurisdiction To Include Carrier-Provided Equipment Within the Registration Program.

Petitioners contend that carrier-provided terminal equipment should have been exempted from the registration program, because no provision of the Communica-

[31] 47 U.S.C. § 151.

[32] 552 F.2d at 1046. Because the states retain their regulatory authority to set rates for carrier-provided equipment, intrastate calls, and a host of other intrastate services, *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951) and *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Indiana*, 332 U.S. 507 (1947), relied upon by Petitioners (N.C.U.C. Pet. at 36), are inapposite. In those cases, the Court rejected the contention that Congress had completely foreclosed state regulation even when there was no conflict between federal and state law. No such issue is presented in this case. The registration program presents a situation in which, as this Court recognized in *Panhandle-Indiana*, federal power must prevail to the extent that there is a conflict between state and federal regulation in an area to which the jurisdiction of a federal agency extends. 332 U.S. at 523.

tions Act specifically authorizes the Commission (in so many words) to require carriers to register their equipment before attaching it to the interstate telephone network. AT&T Pet. at 25-30. However, as the court below observed, this niggardly approach to statutory construction

> "contradicts all relevant authority and confounds the very purpose of agency delegation—institutionalization of authority to fashion policies and programs that implement broad legislative mandates in presently unforeseeable circumstances." [83]

Thus, courts have concluded that "even absent explicit references in the statute, the expansive power of the Commission in the electronic communications field" [84] includes the power to adopt rules designed to implement the purposes of the Act.[85]

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[83] 552 F.2d at 1051 (footnotes omitted). As this Court has observed, the inability to anticipate every potential problem and specifically to provide a remedy for each such problem is the principal reason for creating an administrative agency such as the FCC. *See American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 309-10 (1953); *National Broadcasting Co.* v. *United States*, 319 U.S. at 219-20.

[84] *GTE Serv. Corp.* v. *FCC*, 474 F.2d 724, 731 (2d Cir. 1973) (absence of reference to computers and data processing in the Act does not prohibit the FCC from adopting rules regulating the entrance of common carriers into those non-regulated fields).

[85] *See National Broadcasting Co.* v. *United States*, 319 U.S. at 219 (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was creating a regulatory agency."); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 480-81 (2d Cir. 1971) (recognizing FCC authority to regulate prime time access in television despite the absence of specific statutory reference to such power). *See also United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).



The essence of the Commission's statutory mandate is to insure that the American people enjoy rapid and efficient interstate communication service "with adequate facilities at reasonable charges . . . ." [86] To discharge this responsibility, the Commission must be able to adopt the regulatory policies it finds necessary to protect the technical integrity of the nationwide telephone network. It can scarcely be denied that the establishment of technical specifications for the attachment of terminal equipment to the telephone network is reasonably calculated to protect the technical integrity of the network. And requiring the registration of such equipment—whether supplied by a carrier or a non-carrier—is surely one approach that the Commission reasonably could adopt to insure that such specifications are met. Thus, the Commission's jurisdiction over "all instrumentalities, facilities, [and] apparatus . . . incidental to" interstate telephone communication [87] and its responsibility to protect the network from harm provide a direct statutory predicate for regulating the attachment of terminal equipment.[88]

In the period between the *Carterfone* decision and the adoption of the registration program, the Commission relied on the carriers to take the steps necessary to insure that customer-provided terminal equipment would not jeopardize the technical integrity of the network. The registration program represents a Commission determination that the benefits of attachment of customer-supplied terminal equipment can be realized more fully if the FCC itself assumes the primary responsibility for in-

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[86] 47 U.S.C. § 151.

[87] *Id.* § 153(a), (e), (f).

[88] Moreover, as the court below held, the inclusion of carrier-supplied equipment is a logical application of the Commission's authority under Section 205 of the Act to determine and prescribe just, fair, and reasonable regulations and practices to be observed by carriers. *See* 552 F.2d at 1051-52.

suring that such equipment does not harm the network. This choice between two alternative regulatory approaches to protect the system from harm is one that falls clearly within the Commission's discretion.

It would stand Title II of the Communications Act on its head to suggest that while the Commission may adopt a registration requirement for customer-provided equipment, it may not do the same for equipment supplied by the common carriers. It is the carriers who are subject to the Commission's broad regulatory authority under Sections 201-205 of the Act, and it is they who furnish the bulk of the "instrumentalities, facilities, [and] apparatus" on which the Commission and the public must rely for the provision of interstate telephone service.[39]

There was ample basis for the Commission's exercise of its authority over carrier-supplied terminal equipment in this instance. The Commission's principal reason for refusing to exclude carrier-supplied equipment from the registration program was the fact that it "possesses the same *potential* for harm to the network [as customer-supplied equipment] . . . ."[40] The Commission also

[39] 47 U.S.C. § 153(a), (e), (f). Indeed, the Commission has for many years regulated numerous practices involving carrier-supplied terminal equipment. *See, e.g., AT&T (TWX)*, 38 F.C.C. 1127 (1965) (FCC regulation of carrier-supplied station and supplemental equipment used in furnishing teletypewriter exchange service). And AT&T's current tariffs on file with the FCC address various matters relating to the use of terminal equipment that it provides. *See, e.g.*, F.C.C. Tariff No. 259—Wide Area Telecommunications Service, p. 8.1 (installation, inspection, maintenance, and repair of carrier-provided terminal equipment), p. 9 (payment arrangements for charges for installation of carrier-supplied equipment used in connection with wide area telecommunications service).

[40] *First Report and Order*, 56 F.C.C.2d at 601, Pet. App. at 15b. (emphasis in original). This is particularly so since, as the Commission noted, "much carrier-supplied equipment is purchased from independent manufacturers who market identical equipment to the general public." *Id.* There are more than 1,600 different carriers purchasing various types of equipment from a host of different



concluded that inclusion of carrier-provided equipment will be useful in facilitating the collection of technical data to assist the Commission in deciding what is necessary adequately to protect the network.[41] While Petitioners may dispute the Commission's conclusions on these matters, their disagreement does not raise any issue appropriate for review in this Court.[42]

The Commission was also aware of the competitive advantage that the carriers would enjoy if equipment they supplied was exempted from the registration program. And the decision to include carrier-supplied equipment within the program reflected, in part, the Commission's determination that the overall public interest would not be served if carriers enjoyed such an advantage.[43] Contrary to Petitioners' contention, this is in no way inconsistent with the holdings of *FCC* v. *RCA Communications, Inc.*[44] and *Hawaiian Telephone Co.* v. *FCC*.[45]

The *RCA* and *Hawaiian Telephone* decisions stand for the proposition that, in deciding whether to authorize additional common carrier service under Section 214 of the Communications Act,[46] the Commission may not simply

suppliers. *Memorandum Opinion and Order*, 57 F.C.C.2d at 1218, Pet. App. at 4d. In making its determination, the Commission also had before it evidence demonstrating that carrier-supplied equipment had given rise to a significant number of malfunction complaints in the past and that it might well malfunction and cause harm to the interstate telephone network in the future. *See* Bell System Customer Trouble Report Summary for Fourth Quarter 1974 and Computer and Business Equipment Manufacturers Association comments of July 21, 1975 and January 9, 1976, submitted in Docket No. 19528.

[41] *First Report and Order*, 56 F.C.C.2d at 601, Pet. App. at 15b.

[42] *Cf. Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

[43] *Id.* at 601, Pet. App. at 15b-16b.

[44] 346 U.S. 86 (1953).

[45] 498 F.2d 771 (D.C. Cir. 1974).

[46] 47 U.S.C. § 214.

assume that the "public convenience and necessity" will be served by increased competition.[47] In the present case, no question of certificating additional carriage is involved. In any event, those two decisions held only that the Commission "is not free to create competition for competition's sake"; they did not hold that it should "propagate monopoly for monopoly's sake" or suggest that the Commission may not consider the beneficial effects of competition in a specific area subject to its jurisdiction.[48]

Thus, under *RCA* and *Hawaiian Telephone*, the Commission may rely on the creation of competition as a decisional factor where, based on its own judgment and its evaluation of the particular matter at hand, it finds that the effects of additional competition in the provision of a communications service will be in the public interest.[49] In the present case, the Commission emphasized that its objective was not to promote competition for its own sake but to remove impediments to full realization of the benefits of its established customer interconnection policy while ensuring adequate protection against technical harm

[47] *See FCC* v. *RCA Communications, Inc.*, 346 U.S. at 89-90.

[48] *MCI Telecommunications Corp.* v. *FCC*, No. 75-1635, slip op. at 23-24, 32-33 (D.C. Cir. July 28, 1977).

[49] *FCC* v. *RCA Communications, Inc.*, 346 U.S. at 94-97; *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d at 777; *see Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d at 701 n.11 (approving FCC policy of increasing competition in the interconnection field in order to maximize consumer choice in quantity and quality of telephone interconnection equipment); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, 1158-59 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (approving FCC determination that the public interest would be served by increasing competition in the specialized communications field, where the judgment as to the benefits of competition was based on the Commission's "cumulative knowledge of the industry" and the entire record in the proceeding); *Pocket Phone Broadcast Serv., Inc.* v. *FCC*, 538 F.2d 447 (D.C. Cir. 1976); *General Tel. Co.* v. *United States*, 449 F.2d 846, 857 (5th Cir. 1971).



to the network.[50] The Commission's action and its articulated reasons for that action fully satisfy the standards of *RCA* and *Hawaiian Telephone*.[51]

### III. The Commission Considered the Economic Impact of the Registration Program to the Extent Required by the Communications Act, and Its Decision to Proceed with the Program Was Proper and Adequately Supported.

Petitioners take issue with the manner in which the Commission has exercised its authority in the present case. Specifically, they assert that the Commission was required to, but did not, defer implementation of the registration program until it had made a wide-ranging inquiry into the economic effects that the substitution of customer-provided for carrier-supplied terminal equipment would have on matters such as carrier revenues and intrastate telephone rates. AT&T Pet. at 30-37. Once the Commission's actions in Docket No. 19528 are placed in their proper perspective, this contention is seen to be baseless.[52]

[50] *Second Report and Order*, 58 F.C.C.2d at 740, Pet. App. at 9c.

[51] *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d at 1158-59.

[52] Petitioners also contend that the court below substituted its own analysis for the analysis and findings that the Commission failed to make with regard to economic issues. AT&T Pet. at 30-37. This wholly mischaracterizes the court's actions. The court properly reviewed the record to determine whether the Commission had observed the applicable substantive and procedural requirements set forth in the Communications Act. *See* 552 F.2d at 1053-54, 1056. And it correctly found that the Commission had made the necessary findings and satisfied itself that those findings were adequately supported—thereby properly discharging the functions of a reviewing court. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Nader* v. *FCC*, 520 F.2d 182, 193 (D.C. Cir. 1975). The Petitioners' claim that the doctrine of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), 332 U.S. 194 (1947), has been violated has no basis.

Petitioners claim that the registration program opens the door for the first time to wholesale substitution of customer-supplied terminal equipment for facilities that would otherwise have been provided by the carriers. In fact, as the court below recognized,[53] substitution of customer-provided terminal equipment has been authorized at least since 1969, when the carriers filed new tariffs in response to the Commission's *Carterfone* decision. The purpose of the inquiry in Docket No. 19528 was

> "not to revisit [the] *Carterfone* [question of whether customers should be able to attach their own equipment to the telephone network] but rather to review the present limitations imposed on the attachment of equipment to [the public communications] network." [54]

Since Docket No. 19528 was limited to the narrow issue whether the carriers' CA and NCSU limitations on the existing right of customer interconnection were unjust, unreasonable, or discriminatory, the Commission, as noted by the court below, was required to "focus on the economic effects of the elimination of CAs and NCSUs only." [55]

This does not mean, however, that the Commission was unmindful of the economic impact of the registration

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[53] 552 F.2d at 1053.

[54] *First Report and Order*, 56 F.C.C.2d at 601 n.10, Pet. App. at 15b n.10. It should be noted that the Commission's 1968 *Carterfone* decision was not appealed by the carriers or the states. To the contrary, the carriers, as they themselves concede, "filed with the states new tariffs that generally permitted customer provided terminal equipment to be connected to the telephone line . . . ." AT&T Pet. at 9. Petitioners do not challenge the legality of the general interconnection policy in their current petitions, and they have not asked that the tariffs which were filed in response to *Carterfone* be suspended pending completion of a thorough economic impact analysis.

[55] 552 F.2d at 1054.



program. To the contrary, the Commission fully considered the potential economic effects of the program and acted to mitigate the impact on the carriers.[56] For one thing, as the court below stated,[57] the Commission determined that the "potential economic consequences of any decision [regarding the registration program would be] . . . minimal," since the proceeding was concerned only with alternatives to the CA and NCSU tariff restrictions and did not involve the broader question of substitution of customer-provided for carrier-supplied terminal equipment,[58] an issue that had been settled at the time of the *Carterfone* decision. In any case, the Commission did note that, so far as the basic customer substitution policy was concerned, there had been no

> "showing before the FCC that any actual economic harm has been experienced much less that this has adversely affected any carrier's ability to serve the public." [59]

The Commission did consider the effects that elimination of the CA and NCSU requirements would have on carrier revenues. As the court below observed,[60] the Com-

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[56] As the court below noted, "the specifics of the program—type registration, simplified registration for equipment currently in use, and grandfathering of almost all carrier equipment—" were expected to hold costs to a minimum. *Id.* at 1053. Petitioners themselves concede that a series of modifications made by the Commission in response to carrier suggestions resulted in a substantial reduction of program costs. AT&T Pet. at 27-28 n.47.

[57] 552 F.2d at 1055-56.

[58] *First Report and Order*, 56 F.C.C.2d at 601 n.10, Pet. App. at 15b n.10.

[59] *Second Report and Order*, 38 F.C.C.2d at 740, Pet. App. at 8c. The broad but unquantified allegations of some adverse economic impact that certain carriers had made were quite properly deemed an insufficient basis for denying telephone subscribers the rights that they would enjoy under the registration program. *Id.*

[60] 552 F.2d at 1054.

mission determined that this would not result in a net loss of income for the carriers. The Commission also evaluated the projected costs of the program to the carriers in light of the expected benefits to the public and concluded that the latter outweighed the former.[61] Observing that the Petitioners did not contend that this conclusion was unsupported by substantial evidence, the court below found that the Commission had evaluated and responded to the cost evidence submitted by the carriers and that it would be a "naked assertion of judicial power" for a court to second-guess the Commission's assessment of the facts and its determination of where the public interest lies.[62] Even more clearly, the issue is not appropriate for review by this Court.

The Commission did recognize that, as further information was developed, it might decide that modification of the registration program would be appropriate. Indeed, during the pendency of its inquiry in Docket No. 19528, the Commission commenced a wide-ranging investigation into the economic implications of its general interconnection policy and other matters in a separate proceeding, Docket No. 20003.[63] And the Commission

[61] *Id.* at 1052.

[62] *Id.* at 1053. *See Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974) (Interstate Commerce Commission's conclusion that consumer benefits outweighed adverse impact on the carriers is the kind of judgment that is entrusted to the agency); *General Tel. Co.* v. *United States*, 449 F.2d at 858 ("It is well-established law that it is not for the court to decide the wisdom of an agency's policies").

[63] *Notice of Inquiry*, 46 F.C.C.2d 214 (1974). In fact, before the court below rendered its decision, the Commission issued its *First Report* in Docket No. 20003. The Commission concluded

> "that interconnect competition has had no discernible adverse impact to date on telephone industry revenues or on basic local telephone service rates and availability, and that there is very little likelihood of any adverse impact in the near future." 61 F.C.C. d 766, 870 (1976).



made clear its expectation that, depending on the findings in Docket No. 20003, it might institute further proceedings looking toward possible modification or revision of the registration program.[64] However, the fact that an agency such as the FCC undertakes to review its major policies from time to time does not mean that each and every time it acts in furtherance of an existing policy —as it did when it adopted the registration program— it must revisit and reinspect the policy's foundation. Nor does it mean that when the Commission does engage in such a reexamination, all actions in furtherance of the existing policy must be indefinitely suspended until completion of the wider-ranging inquiry. Thus, implementation of the registration program did not have to await completion of the Commission's broader inquiry into the economic implications of its basic interconnection policy.[65]

[64] *Second Report and Order*, 58 F.C.C.2d at 740, Pet. App. at 8c. In addition, the Commission has undertaken to grant relief from the effects of the registration program to individual carriers by way of waiver if they can demonstrate that they will otherwise suffer economic harm that will cause "direct, substantial and immediate . . . injury to [the carrier's] telephone system and detriment to the public interest . . . ." *AT&T (Mebane Home Tel. Co.)*, 53 F.C.C.2d 473, 481 (1975), *aff'd sub. nom Mebane Home Tel. Co.* v. *FCC*, No. 75-1617 (D.C. Cir. April 30, 1976) (unpublished opinion). The fact is that as of the time of the *Second Report and Order* in Docket No. 19528, only one party, Mebane Home Telephone Company, had sought a waiver of the Commission's *Carterfone* interconnection policy on the basis of economic harm, and, at the request of Mebane, that hearing was terminated prior to the introduction of evidence. *See Second Report and Order*, 52 F.C.C.2d at 740, Pet. App. at 7c-8c.

[65] This is particularly so in view of the improbability of any adverse economic impact (as evidenced by nearly a decade of experience under *Carterfone*) and the present and demonstrable injury to the public's beneficial use of the telephone system resulting from the CA and NCSU restrictions. *Second Report and Order*, 58 F.C.C. 2d at 740, 746, Pet. App. at 8c, 18c-19c.

This Court has held that the Commission is not required to postpone a proposed course of action pending completion of a separate proceeding that may require modification of that action. *FCC* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949). *See Coastal Bend Television Co.* v. *FCC*, 234 F.2d 686 (D.C. Cir. 1956).

Section 4(j) of the Communications Act[66] confers on the Commission the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . ." It was clearly appropriate for the Commission, in its discretion, to consider the technical rules for implementing its customer interconnection policy separately from its broader examination of the economic effects of that and other existing policies.[67] Indeed, two courts have already held that it was proper for the Commission to implement its "specialized common carrier" program pending resolution of economic impact issues under consideration in the same proceeding in which the economic implications of customer interconnection are being explored.[68]

In short, having found the CA and NCSU tariff restrictions to be unjust, unreasonable, and discriminatory, the Commission prescribed the registration program. It acted only after having assessed the economic impact of the program—as distinct from the impact of its broader interconnection policy—and having found that any impact would be outweighed by the benefits of the program. It was required to go no further.

## CONCLUSION

For the reasons stated above, the petiitons for writ of certiorari should be denied.

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[66] 47 U.S.C. § 154(j).

[67] *See Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) (upholding FCC decision to approve a rate of return for AT&T at the completion of the first phase of a two-phase investigation even though the related issue as to the earnings of AT&T's manufacturing subsidiary, Western Electric, remained to be determined in phase 2 of the investigation); *Associated Press* v. *FCC*, 448 F.2d 1095, 1105-06 (D.C. Cir. 1971). *See also FCC* v. *Schreiber*, 381 U.S. 279, 289 (1965). A court may not direct the Commission to order its docket and consider its cases in any particular priority. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

[68] *See AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d at 1142.



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IN THE

# Supreme Court of the United States

October Term, 1976

## No. 76-1675

THE NORTH CAROLINA UTILITIES COMMISSION,
SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, ET AL.,
Respondents.

## *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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### OPINIONS BELOW

Now comes the Public Utilities Commission of Ohio (hereinafter referred to as PUCO) by its counsel, William J. Brown, Attorney General of Ohio, in support of the Petition of the North Carolina Utilities Commission and the Southeastern Association of Regulatory Utility Commissioners (hereinafter referred to as Petitioners) requesting this Court to issue a writ

of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *North Carolina Utilities Commission v. Federal Communications Commission*, — F 2d — (4th Cir. 1977), which has not yet been officially reported. This *amicus curiae* brief in support of the petition is filed pursuant to U.S. Sup. Ct. Rule 42, 28 U.S.C., requiring prompt filing prior to the consideration of the petition.

## INTEREST OF THE *AMICUS CURIAE*

In 1911 the General Assembly of the State of Ohio delegated to the PUCO the responsibility, *inter alia*, to regulate both the price at which telecommunication services and equipment may be offered within the State of Ohio, and the terms and conditions under which such services and equipment can be offered. The statutory framework of regulation of the provision of the telecommunication network in the State of Ohio is based upon three fundamental decisions by the Ohio General Assembly. First, that each company engaged in the business of transmitting telephonic messages in the State of Ohio have a defined service area in which it may operate (Section 4905.24, Ohio Revised Code, 1954); secondly, there would be no competition between such companies (Section 4905.24, Ohio Revised Code, 1954); and, finally, that these companies be required by law to furnish adequate facilities and services at reasonable rates (Section 4905.22, Ohio Revised Code, 1954). Thus, the State of Ohio, in exchange for allowing such companies to operate as monopolies has required them to assume certain responsibilities and duties. It is the responsibility of the PUCO to assure that these utilities meet their responsibilities. The general purpose of this statutory framework is obvious: to promote the provision of a reliable telecommunications service which is physically and economically available to all the citizens of the state. The means by which this is to be accomplished is by regulation and supervision of companies who are responsible to the state for carrying out this policy.



The order of the Federal Communications Commission (hereinafter FCC) establishing a massive new Federal registration program for the provision of terminal equipment which is used predominantly for, or in connection with, local and intrastate communication service, would impair, if not destroy, the ability of the State of Ohio to assure that its citizens will continue to enjoy adequate telephone service at reasonable rates. Traditionally, the provision of terminal telephone equipment has been considered an integral part of adequate telephone service on the local level. Hence, traditionally those who have provided such equipment have had, in Ohio, the legal responsibility not only to provide this equipment but to provide adequate equipment. Not only does the FCC's decision to allow companies, who are not subject to regulation in the State of Ohio but who have met the FCC's registration requirements, to provide an integral part of the provision of intrastate service impair the state's ability to supervise and control the quality of service its citizens will receive, but it will also inevitably impair, if not destroy, the ability of the state to pursue its rate making policies. For these reasons the PUCO strongly supports the petitioners.

## STATEMENT OF THE CASE

Petitioners seek review of the decision of the Fourth Circuit Court of Appeals affirming orders of the FCC

instituting a Federal registration program for all types (with minor exceptions) of terminal equipment to be interconnected with local telephone exchange equipment. This registration program will effectively take the place of state regulation and control of the terminal facilities used in the provision of intrastate service and may have serious adverse impact upon the revenues and rates of the various telephone operation companies throughout the nation. The history of the proceedings before the FCC leading to this new Federal intrusion upon matters which are clearly of local concern as well as the history and general principles of the supervision and control of these local concerns by the states has been set forth extensively by petitioners in their Statement of the Case. While the PUCO agrees with that discussion there is one point which the PUCO would emphasize. This is, that the provision of telephone service and the terms, conditions and rates under which that service will be provided, will, because of the inherent nature of the telecommunications network in the country, vary from state to state.

There are 51 telephone companies operating in the State of Ohio. These companies include not for profit, or mutual companies, range in size from the North Creek Mutual Telephone Company with 123 main stations to the Ohio Bell Telephone Company with 2.4 million main stations, and provide service under widely varying geographical conditions with differing customer mixes. The PUCO regulates all of these companies. While the PUCO's general policy is to promote the provision of service to all citizens at an economically attractive price, it must nevertheless recognize that what may be a viable policy to enforce with respect to



the Ohio Bell Telephone Company, may destroy the economic viability of a small telephone company.

Traditionally, the PUCO has supervised the quality of the service and facilities furnished by telephone companies and fixed rates for those services. The intrastate supervision of the quality of local service and facilities necessarily, except for limited kinds of service, defines the quality of interstate service. This is true because of the obvious and inescapable fact that almost all telephonic messages whether interstate or intrastate are initially conveyed through local facilities. Thus, the quality of the telephone network in the nation depends and will always depend, in large part, upon the ability of local authorities to effectively respond to local problems.

In addition to supervising the quality of the telephone network in the State of Ohio, the PUCO is also responsible for fixing the rates charged by the telephone operating companies for the various kinds of services and facilities they provide. As the characteristics of the telephone companies and their consumers vary widely in the State of Ohio, generalizations about the rate making policies of the PUCO are somewhat dangerous. However, the PUCO has traditionally and almost uniformly applied what is referred to as the "value of the service method" when fixing fair and reasonable rates for telephone companies. Simply put, this means that the rates are not based upon the cost of providing particular kinds of services or facilities but on an assessment of what rate will attract universal acceptance of the service. This, of course, means that the rates for some services or facilities will be higher than their costs while other rates will be below the cost. In other words,

the PUCO has fostered some amount of subsidization of certain consumers by others. The purpose of such a policy has been to encourage acceptance of the telephone, particularly by residential consumers. Such a policy not only accrues to the benefit of residential customers but to other customers as well, since the number of people they can call, or who can call them increases, which thereby increases the value of their telephone service.

While the extent of subsidization among classes of subscribers using various kinds of facilities and services is often the subject of a great deal of debate during rate cases at the PUCO there is one fact that is clear: the provision of adequate service depends to a large extent on the charge for that service. The almost universal acceptance of telephone service in every home is a relatively recent phenomenon, which the PUCO believes, has occurred in large part because the installation charges and monthly rates for residential service have, by design, been very reasonably priced. It has been the experience of the PUCO that the rates for telephone service and facilities and the quality of that service are inextricably intertwined.

Both the FCC and the Fourth Circuit Court of Appeals have failed to address and, we submit, really comprehend the potential impact of the Federal registration program for terminal equipment on the public. While the FCC has, through its registration program, attempted to resolve the problem of damage to the telephone network by the connection of inferior customer owned equipment this is only one aspect of all of the considerations which, assuming the FCC has the jurisdiction to control the provision of local facilities,



the FCC should have evaluated before establishing such a program. The FCC failed to assess or even recognize the adverse effects its registration program will have on the quality of and rates for intrastate service which is, as was pointed out by Petitioners, 97% of the service provided by telephone companies. Not only does the FCC's registration program represent a clear intrusion into matters which have and should continue to be dealt with by the state, but it embarked upon this program without giving consideration to the impact of its new policies upon local subscribers and upon the ability of local governments to meet their responsibility for assuring adequate service and facilities at reasonable rates.

## REASONS FOR GRANTING THE WRIT

The FCC's orders instituting a Federal registration program for the interconnection of customer provided terminal equipment clearly exceed the jurisdiction conferred upon the FCC and preempts jurisdiction over intrastate service, facilities and rates which was specifically reserved to the states. Section 2(B) of the Communications Act of 1934 clearly provides that the jurisdiction of the FCC cannot be extended to "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier" 47 U.S.C. Section 152(B). As it is an uncontrovertible fact that intrastate service and facilities are, and have always been, used for the provision of the vast majority of interstate service it would seem clear this language reserves to the state jurisdiction over facilities which are used for both intrastate and interstate commerce. That

this is indeed the meaning of the language is, as petitioners have pointed out, conclusively demonstrated by the legislative history of the Act. Such a reservation of power to the states is also dictated by common sense.

The users of telephonic equipment on the state level have basically three interests: first, that the equipment which meets their needs for service can be obtained; secondly, that the equipment that is provided works; and finally, that the equipment and the total service is provided at a reasonable price. It has been the settled policy to entrust the protection of these interests to those who are most closely attuned to the telephone subscribers and the companies who provide telephone service, that is, the states. Thus, if a customer cannot obtain service or facilities, if his service or facilities malfunction, or if he believes the rates for the service and facilities are excessive, he can relatively easily seek assistance from a state agency such as the PUCO.

This Court has recognized the connection between the type of problems with which government must deal and the decision of which level of government has been assigned the responsibility of resolving those problems. In *Palmer v. Massachusetts*, 308 U.S. 79 (1939), this Court was presented with a decision by a District Court that the powers conferred upon the District Court by the Federal Bankruptcy Act over insolvent railroads included the power to authorize a railroad undergoing reorganization proceedings before the court to abandon certain intrastate rail service which was unprofitable. While the interests of the District Court in assuring a viable reorganization of an insolvent interstate railroad were clear, the Court of Appeals for the Second Circuit reversed the District Court's order authorizing



abandonment of intrastate service. In the decision on the subsequent appeal to the United States Supreme Court Justice Frankfurter, writing for the majority aptly stated the problem facing the Court:

> "Plainly enough the District Court has no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.
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> "To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. [citations omitted]" 303 U. S. 79, 89

In analyzing whether Congress had in fact given the District Court power to deal with a matter in the keeping of state authorities, the majority stated:

> "The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states. . . . If this old and familiar power of the state was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change." 308 U.S. 79, 84-85.

The language set forth above was cited and followed by this Court as recently as 1971 in its decision in *United States v. Bass*, 404 U.S. 366 (1971).

We submit that this analysis should have been used by the Fourth Circuit Court of Appeals when reviewing the orders of the FCC establishing a Federal registration program for the connection of customer provided telephone terminal equipment and that if it had, the FCC's orders would have been reversed. The dependence of local consumers on local telephone facilities and services has for half a century placed control over the terms, conditions, and rates under which that service will be provided, within the regulatory authorities of the states. If this old and familiar power of the states was withdrawn when Congress gave the FCC powers over the provision of interstate telephone service, there ought to be language fitting for so drastic a change. In fact the language of the Federal Communications Act indicates that Congress, recognizing the dependence of local subscribers on local control of telephone facilities and rates, intended to preserve the then existing balance between Federal and state governments.



However, if it is assumed that the intent of Congress was other than what the plain language of Section 2(B) of the Communications Act of 1934 indicates, and that the FCC has and has always had the authority to assert control over facilities used in the provision of intrastate commerce, then the question becomes whether the FCC has exercised its authority in a reasonable and proper manner. The touchstone of FCC action must be the public interest and not mere enhancement of competition. *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86 at 97 (1953). While the question of protection of the telephone network from harm by the provision of customer provided equipment is, of course, a necessary part of the decision that the equipment can be provided by a customer rather than a telephone company, this is clearly, as the FCC has recognized, only one of the considerations which must be addressed if the FCC can purport to act in the public interest.

While there are a number of potential problems raised by the FCC's assertion of jurisdiction over local facilities, the obvious one is the potential economic impact upon the telephone companies and their subscribers. The FCC failed to analyze the economic impact on interstate service let alone intrastate service prior to its decision to implement the registration program. The Court below, apparently recognizing the significance of this issue, supplied its own analysis. This analysis was, apparently that the economic impact would be slight since the "*registration program* could hardly be expected to cause a substitution effect". Petitioners' App. 32a (Emphasis in original). Thus, the basis for decision of the Court below was the peculiar rationale that the competition the registration program

was designed to allow and promote would be unsuccessful.

The State of Ohio cannot view the situation so blithely. The potential adverse economic impact upon the telephone companies is real. The potential impact upon the state's rate making policies is real. The potential impact upon the state's authority to assure that telephone subscribers are receiving adequate facilities that will be properly maintained is real. There can be no doubt that the FCC registration program represents a major change in the provision of telephonic equipment and that it will emasculate the state's ability to control not only the facilities which are provided to subscribers, but the state's ability to continue to pursue its present rate making policies. Surely if such a substantial and far reaching change can be made under the Communications Act of 1934, the problems posed by such a change demand a reasoned approach. Such an approach has been entirely lacking in the decisions of the FCC and the Court below.



## CONCLUSION

*Amicus curiae* PUCO supports the petitions for a writ of certiorari of the judgment of the Fourth Circuit Court of Appeals in the consolidated case below and respectfully urges this Court to grant such Petitions.

Respectfully submitted,

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## APPENDIX

Statutory provisions referred to herein which are not set forth in the Appendices of the Petitioners.

**§4905.22 Service and facilities required; unreasonable charge prohibited.** (GC §§ 614-12, 614-13)

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

**§4905.24 Company not permitted to exercise right of franchise where another is giving adequate service.** (GC § 614-52)

No telephone company shall exercise any permit, right, license, or franchise that was granted prior to June 30, 1911, but was not actually exercised, or granted after such date, to own or operate a plant for the furnishing of any telephone service, in any municipal corporation or locality where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the public utilities commission a certificate, after public hearing of all parties interested, that the exercising of such license, permit, right, or franchise is proper and necessary for the public convenience.

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